(30,956)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 315

MARION & RYE VALLEY RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Copy of report of board of referees	9	5
General traverse	45	26
History of proceedings	45	26
Argument and submission of motion for a new trial	45	26
Order on motion for a new trial	45	26
Findings of fact	46	27
Conclusion of law	60	41
Opinion, Hay, J.	60	41
Judgment	65	46
Petition for appeal	65	47
Order allowing appeal	65	47
Clerk's certificate	66	47

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1925

[fol. 1] **IN UNITED STATES COURT OF CLAIMS**

C-699

MARION & RYE VALLEY RAILWAY COMPANY, PETITIONER

I. PETITION—Filed June 1, 1923

To the Honorable Judges of the United States Court of Claims:

The petitioner respectfully represents:

1. That it is a corporation organized under the laws of the State of Virginia, with its principal office in the City of Marion, in the State of Virginia, and that its post office address is at Marion, Virginia.

2. That it has at all times borne true allegiance to the Government of the United States.

3. That at all times hereinafter mentioned it was engaged in business as a common carrier of freight and passengers for hire, operating a line of railroad from Marion in the State of Virginia to Sugar Grove in said State, and that during the period January 1, 1918 to June 30, 1918, the same being the first six months of the period of the Federal control of Railroads, it connected with the rails of the Norfolk & Western Railway Company, then under Federal control.

4. That it was taken under Federal control of the Government of the United States, and the President thereof, by virtue of a [fol. 2] Proclamation of the President of the United States, of date, December 26, 1917, which said Proclamation was made as provided by Section 1 of the Act approved August 29, 1916, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes;" and of the Act of Congress approved March 21, 1918, commonly called the "Federal Control Act," and that it was not relinquished from such control until the 29th day of June, 1918; and that it had no contract for compensation with the Director General of the United States.

5. That it has submitted to the Director General of Railroads an application for compensation, for a sum not in excess of the standard rate of return (one half of the average railway operating income of the three years ended June 30, 1917, as defined in Section 1 of the said Federal Control Act) but that the Director General has declined and still refuses to make the petitioner any payments of any amounts whatsoever or any agreement for payment of compensation to it.

6. That its average annual railway operating income, as defined in Section 1 of the Federal Control Act, was Twenty-one thousand, nine hundred ninety-one and 91/100 ($21,991.91) dollars, and that one-half thereof applicable to the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as aforesaid, was Ten thousand, nine hundred ninety-five and 95/100 ($10,995.95) dollars and that it received as net income for the said six months period One [fol. 3] thousand eight hundred ninety-seven and 43/100 ($1,897.43) dollars, leaving due it as balance of compensation, the sum of Nine thousand, ninety-eight and 52/100 ($9,098.52) dollars.

7. That during the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as aforesaid, it suffered depreciation of equipment by reason of the failure of the Director General and the President of the United States adequately and appropriately to provide for the maintenance, repairs, renewals and depreciation of rolling stock and equipment in the sum of Seven thousand, forty-one and 29/100 ($7,041.29) dollars.

8. That during the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as *as* aforesaid, it suffered damage by reason of the failure of the Director General and the President of the United States to adequately and appropriately provide for the Maintenance of Way and Structures in the sum of Three thousand, nine hundred twelve and 55/100 ($3,912.55) dollars.

9. That by reason of the premises this Petitioner claims and contends that it is entitled to have, and receive from the United States through the Director General of Railroads the sum of Twenty thousand, fifty-two and 36/100 ($20,052.36) dollars, with interest at the rate of 6 per cent per annum from the date of relinquishment of the carrier's property, but which the Director General refuses to [fol. 4] pay or allow to the Petitioner and refuses to pay or allow any sum whatsoever to the Petitioner.

10. That because of the refusal of the Director General to pay or allow any sum whatsoever to the Petitioner, or to make any agreement for payment of compensation to it, the Petitioner has, as provided by Section 3, of the said Federal Control Act, made application for the appointment of a Board of Referees to hear and report upon the amount of the just compensation and such board has been appointed by the Interstate Commerce Commission, as in the aforesaid section of said Act provided, and said board has given full hearing to the Petitioner and the United States, and has reported to the President the amount of the just compensation in accordance with the provisions of the said Act.

11. The report of said Board finds as follows:

(a) That Federal Control of plaintiff's (petitioner) railroad property within the intent of the Federal Control Act was established in law and in fact at 12:00 noon on December 26, 1917, and continued until June 29, 1918, that for the purpose of determining just compensation such Control period is considered to be the first six months of 1918 under stipulation of counsel.

(b) That compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the Government and agreement to pay the fair rental therefor.

(c) An unadjusted balance of just compensation due the plaintiff [fol. 5] of Nine thousand seven hundred twenty-eight and 57/100 ($9,728.57) dollars.

(d) That it (the Board) has jurisdiction and clearly it is its duty to consider and report upon plaintiff's claims on account of the alleged undermaintenance of its properties.

(e) That Four thousand six hundred ninety-seven and 37/100 ($4,697.37) dollars is just compensation to the plaintiff on account of the failure of respondent to return its property in as good repair and complete equipment as it was in, at the commencement of Federal Control; and that the total amount of unadjusted compensation due the plaintiff from the respondent (The Director General of Railroads) is Fourteen thousand four hundred twenty-five and 94/100 ($14,425.94) dollars.

Copy of the report of the Board is attached as appendix to this Petition.

12. That the Director General of Railroads still refuses to pay or allow any sum whatsoever or to make an agreement for just compensation to the Petitioner.

13. That no assignment or transfer of said claim or of any part thereof or interest therein has been made.

14. That the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credit and offsets.

Wherefore the Petitioner prays the Court of Claims of the United [fol. 6] States to determine the amount of such just compensation, as provided by said Section 3 of the Federal Control Act.

(Signed) Marion & Rye Valley Railway Railway Company. J. P. Buchanan, Attorney for Floyd L. Knight, Trustee. F. Sitterding, President Marion & Rye Valley Railway Company. Ben B. Cain, Attorney of Record.

International Building, 1319 F Street N. W., Washington, D. C.

Sworn to by Geo. F. Cook et al. Jurats omitted in printing.

[fol. 7] Know all men by these presents:

That I do hereby authorize Ben B. Cain of Washington, D. C., to appear for me as counsel before the Court of Claims, in the matter of Compensation Docket No. 77, formerly before the Interstate Commerce Commission, and now pending in said Court of Claims, on petition of the Marion & Rye Valley Railway Company.

Witness my bond at Lynchburg, Virginia, on the 8th day of May, 1923.

(Signed) Floyd L. Knight, Trustee.

STATE OF VIRGINIA,
City of Lynchburg, To wit:

I, M. P. Davis, a Notary Public in and for the City and State aforesaid, do certify that Floyd L. Knight, Trustee, whose name is signed to the foregoing writing dated the 8th day of May, 1923, has this day [fol. 8] personally appeared before me in my City aforesaid, and acknowledged the same.

Given under my hand and seal the 8th day of May, 1923.

(Signed) M. P. Davis, Notary Public. (Seal.)

STATE OF VIRGINIA,
City of Richmond,
Virginia, To wit:

Know all men by these presents:

That I, F. Sitterding, President of the Marion & Rye Valley Railway Company, do hereby make, constitute, appoint and authorize Ben B. Cain, of Washington, D. C., attorney for the Marion & Rye Valley Railway Co., to appear for said Company before the Court of Claims in the prosecution of matters arising out of the decision of the Board of Referees of the Interstate Commerce Commission in the matter of Compensation Docket No. 77, and to do all things necessary in the premises.

Given under my hand this the 10th day of May, 1923.

(Signed) F. Sitterding, President, Marion & Rye Valley Railway Co.

VIRGINIA,
City of Richmond, To wit:

I, N. L. Flippen, a Notary Public in and for the City and State aforesaid, do certify that F. Sitterding, President of the Marion & Rye Valley Railway Company, whose name is signed to the foregoing writing dated the 10th of May, 1923, has this day personally appeared [fol. 9] before me in my county aforesaid, and acknowledged the same.

My commission expires November 27th, 1923. Given under my hand and official seal, this the 29th day of May, 1923.

(Signed) N. L. Flippen, Notary Public.

Compensation Docket, No. 77

MARION & RYE VALLEY RAILWAY COMPANY, Plaintiff

v.

DIRECTOR GENERAL OF RAILROADS, Respondent

REPORT OF REFEREES

Submitted June 2, 1922. Report Made Sept, 30, 1922

S. S. Ashbaugh, George H. Parker, J. P. Buchanan and Ben B. Cain for Plaintiff.

A. A. McLaughlin and Sidney F. Andrews for Respondent.

To the President of the United States:

The undersigned, a board of referees appointed by the Interstate Commerce Commission on February 6, 1922, in performance of duties prescribed in section 3 of the federal control act (40 Stat. 451), [fol. 10] makes this, its report, upon the claim for just compensation presented by the Marion & Rye Valley Railway Company, a corporation of the State of Virginia, herein called plaintiff.

Plaintiff contends, in substance, that it operated a railroad by steam power and was a common carrier engaged in the transportation of passengers and property for hire; that on December 28, 1917, its railroad property was taken under Federal control by virtue of a proclamation of the President of the United States; that its railroad property was not relinquished from Federal control until June 29, 1918; that it submitted to the Director General of Railroads its application for compensation for the use of its property during the period of said control; and that the Director General of Railroads has declined, and still refuses, to make any payment, or agreement for payment, of compensation to plaintiff for said use.

Its claim for compensation for the use of its property as revised at the hearing, is based upon the standard return (hereinafter described) as follows:

One-half standard return applicable to period during which plaintiff claims to have been under federal control, Jan. 1, 1918, to June 29, 1918	$11,626.00	
Minus net income for said period	1,897.43	
		$9,728.57
Depreciation due to lack of adequate maintenance of its property		10,493.33
Total		$20,221.90

[fol. 11] The respondent did not file a written answer, but at the hearing admitted that plaintiff at the time in question operated a railroad as a common carrier for hire and that the Director General

of Railroads had refused to make any payment on account of the alleged federal control of plaintiff's said railroad. Respondent denied all other allegations of the complaint.

Following are the principal issues in this proceeding, raised by the pleadings and by the contentions of counsel:

Was there such control of plaintiff's railroad by the Government during the first six months of 1918 as to entitle it to the benefits of the Federal Control Act?

If plaintiff is entitled to compensation should it be fixed on an annual rental basis or measured by pecuniary loss suffered by reason of Federal control?

What is the amount of just compensation, if any, to which plaintiff is entitled?

Has the board jurisdiction to hear and determine plaintiff's claims on account of deferred maintenance?

[fol. 12] What is the amount, if any, to which plaintiff is entitled on account of underinaintenance of its property?

Was there such control of plaintiff's railroad by the Government during the first six months of 1918 as to entitle it to the benefits of the Federal Control Act?

Respondent contends (1) that in order to entitle it to compensation plaintiff must show an actual (as distinguished from a technical) possession, use, control and operation of its railroad by the Government and has failed to make such showing; (2) that plaintiff operated its own railroad during the said period, within the meaning of section 204 of the Transportation Act, 1920, which in such case provides an exclusive remedy with the Interstate Commerce Commission, and the board is accordingly without jurisdiction in these proceedings, which were not instituted until after the passage of said Act.

On December 28, 1917, plaintiff was engaged in the business of general transportation as a common carrier of passengers and property for hire and operated a steam railroad within the boundaries of the continental United States and wholly within the state of Virginia, approximately 22 miles long, including side-tracks, extending from Marion to Sugar Grove, Virginia, where it connects with the Virginia Southern Railroad which is under the same management and ownership as the Marion & Rye Valley Railway. Plaintiff's railroad connected with the Norfolk & Western Railway at Marion, Virginia, and in addition a large portion of the traffic which came to it over [fol. 13] the lines of the Virginia Southern Railroad Company was competitive since it came from a country which was equally accessible to the Virginia Southern Railroad and the Virginia Carolina Railroad. The latter was under federal control, being a part of the Norfolk & Western Railroad system. Plaintiff's railroad was not owned, controlled or operated by another carrier company.

(1) On August 29, 1916, Congress passed the National Defense Act, so-called (C. 418, 39 Stat. 619) providing that:

"The President in time of war is empowered * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, the President, referring to the then existing state of war, proclaimed that pursuant to the power vested in him by Congress he did thereby take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation in the United States.

It is argued that the possession intended under said Act was to be evidenced by the utilization of the railroad for war purposes and the exclusion as far as necessary of other traffic over it. The record is not clear as to what specific use the commodities carried by plain- [fol. 14] tiff's railroad were put to. There is testimony to the effect that certain manufactured products, notably tanning extract, used in tanning leather, was stimulated by the war. Timber continued to be carried but whether any of it ever found its way into the numerous war camps is not shown. If respondent means that in order to constitute actual possession and control there must have been transportation of troops or of actual materials to equip them in their camps or in the field over plaintiff's railroad this board cannot concur. Private interests were under contract with the government constructing camps, building ships, manufacturing apparel, and producing foods. All of these industries and many others were closely connected with the emergency and had to be afforded transportation.

Directly following the President's proclamation, Wm. G. McAdoo, named therein as Director General of Railroads, sent out many general orders and circulars to the railroads generally, some of which were shown to have been received by the plaintiff and are contained in the record as exhibits, among which are the following:

General Order No. 1, dated December 29, 1917, directing among other things, that all railroad officers, agents and employees may continue in the performance of their present regular duties; that all railroads covered by the President's proclamation be operated as a national system without regard to ownership; that the designation of routes by shippers be disregarded in the interest of efficiency; that agreements between carriers be not permitted to interfere with expedition of traffic.

A circular letter dated January 8, 1918, addressed to all railroad [fol. 15] officers and employees, urging their utmost energy and devotion in their work and announcing that they were, in effect, in the service of the United States.

General Order No. 28, dated May 25, 1918, establishing a twenty-five per cent rate increase covering all railroads under federal control,

effective June 10, 1918, as to passenger rates and baggage charges and effective June 25, 1918, as to freight rates, compliance wherewith appears to have been finally effected after the date of the notice of relinquishment (see infra) but prior to its receipt by the plaintiff.

A notice that plaintiff's railroad had been relinquished from federal control, dated June 24, 1918, but not received until after July 1, 1918. Some question arising as to the effective date of the relinquishment, it was stipulated by counsel for the parties that the claim might be considered to cover the first six months of 1918.

General Order No. 1 and a circular letter of January 8, 1918, received by the plaintiff following the President's proclamation above noted, constituted the officers and employees of the plaintiff the officers and employees of the government. Regional directors and federal managers were later appointed for the railroads generally but no additional steps were necessary to make the officers and employees of the carriers the officers and employees of the government. As employees of the government their operation of plaintiff's railroad was the operation of the government through its constituted agents.

Effective March 21, 1918, Congress passed the Federal Control Act (C. 25, 40 Stat. 451). Its title, "To provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes," defines the [fol. 16] purposes and general motive of the Act. The seventh paragraph of section 1 of said Act reads:

"That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control" as herein defined and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, that nothing in this paragraph shall be construed as including any street or interurban electric railway * * *."

Plaintiff's railroad falls within the class referred to in said seventh paragraph. No distinctions are made as between actual and technical control. All railroad of the class described "shall be held and considered as within 'Federal control' as herein defined * * * and shall be entitled to the benefit of all the provisions of this Act." The language used is clear and unambiguous. It is followed by the proviso, "That nothing in this paragraph shall be construed as including any street or interurban electric railway * * *." It is to be concluded from the fact that street railways are expressly excluded in this Act that if it had been intended to exclude from the benefits of the Act the "short lines," or any such as were not more or less directly used in war work, it would have been done in like unmistakable manner. Furthermore the board considers that paragraph 7 of section 1 confirms a federal control [fol. 17] already established by the President's proclamation and

does not regard it as an original taking of control. Any other view would be inconsistent with other sections of the Act, in particular, section 14 which provides methods for relinquishing such railroads as after a period of federal control were found not needed, and bears out the conclusion that all railroads were included in the first taking.

(2) Effective February 28, 1920, Congress passed the Transportation Act, 1920 (C. 91, 41 Stat. 456), which, so far as it is relevant to the matter at hand, was an act specifying the terms upon which the Government relinquished its control of the railroads. Section 204 of this Act applies exclusively to carriers

"by railroad which during any part of the period of Federal control; engaged as a common carrier in general transportation, and competed for traffic; or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

Said section 204 provides that any such carrier shall be paid a sum calculated to offset its deficit in income (the existence and amount of such deficit being determined by comparison with its income during the test period) "for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation," only.

Respondent contends that this Board is deprived of jurisdiction of the proceeding by the above provision of the Transportation Act in that it confers exclusive jurisdiction upon the Interstate Commerce [fol. 18] Commission to reimburse carriers of the class specified for any such deficit in income incurred for that portion (as a whole) of the period of federal control during which they operated their own railroads. Respondent's brief, pp. 15-16, reads:

"It is very evident that, by passage of this Act, Congress intended to distinguish between roads that had technically been taken over by the terms of the President's proclamation and those actually taken and actually operated by him."

In the opinion of the board, Congress did not have in mind the distinction between actual and technical operation and control but rather the fact that many roads of the class to which plaintiff's road belongs had been relinquished in accordance with section 14 of the Federal Control Act and that in those instances both a period of private and of governmental operation existed during the period of Federal control as a whole.

Respondent distinguishes the decision in Application of St. Joseph Belt Ry. Co., 65 I. C. C., 443, wherein under very similar circumstances the Interstate Commerce Commission, Division 4, denied the carrier compensation under section 204 of the Transportation Act because it was considered that it was not being privately operated, alleging that there was evidence in that case of certain acts of the Director General which supplied the necessary elements

to constitute federal control and operation, but which are lacking in the case at hand. That this was not the controlling consideration is shown by the following extract from the decision in that case (pp. 5-6):

[fol. 19] "Although not detailed in this record, it is a well-known fact that the extent to which the Director General found it necessary to change existing organizations and practices varied greatly with the different railroads taken over. In some cases, the changes were undoubtedly slight; in others, they were substantial. Under these circumstances, an attempt to draw a line of distinction between roads taken over by the Government, classifying some as Federally operated and others as privately operated, would meet great difficulties. A more practical view is to regard the taking over of the roads by the President, the appointment of the Director General, and the assumption of authority by him and his representatives, as supplying the necessary elements to constitute Federal operation as well as Federal control. In the case of the St. Joseph Belt, as we have seen, the Director General exercised control in the most important matters affecting the income of the carrier. In at least one important instance, the action taken was not only without the consent of the owners, but was against their desire."

If respondent's contention that actual (as opposed to technical) control and operation must be established as a prerequisite to a carrier's right to compensation under the Federal Control Act were to be carried to its logical conclusion the date when acts of federal direction became of sufficient importance to constitute actual control and operation would have to be determined with regard to every carrier in the country and the compensation of each adjusted accordingly.

We find and report that federal control of plaintiff's railroad property within the intent of the Federal Control Act was established in law and in fact at 12 o'clock noon on December 28, 1917, and con-[fol. 20] tinued until June 29, 1918; that for the purpose of determining just compensation such control period is considered to be the first six months of 1918 under stipulation of counsel.

If plaintiff is entitled to compensation, should it be fixed on an annual rental basis or measured by pecuniary loss suffered by reason of Federal control?

At the close of the hearing respondent made the following motion to dismiss, upon which decision was reserved:

"I now desire to renew my motion made at the close of the plaintiff's case, that this case be dismissed on its merits, because of the absence of proof of any loss suffered by this railway company during the first six months of 1918, caused by any act of the Government or the Railroad Administration."

The contention is that the government should not be called upon to make good the difference between what the railroad earned during federal control and a fair rental for its use based on its normal earn-

ings, for the reason that the conditions which lowered the railroad's income, such as loss of traffic and high operating costs, resulted from general war conditions and were not due to federal control or any act of the government.

The government is never deemed liable in tort for its own acts or the acts of its agents. Its liability, if any, therefore, must be of [fol. 21] a contractual nature. In Johnson v. United States, 2 Ct. Cls. 391, involving an action to recover for the military occupation of land which the court found was a temporary occupation only, it was said:

"But the court has also held to the principle of the common law that the republic does no wrong and the provision of the Constitution 'nor shall private property be taken for public use without just compensation' and by virtue of these, it always had been held that a party might recover upon the implied contract as though the property had been acquired under an agreement of purchase, leaving the price undetermined."

To the same effect: United States v. Great Falls Mfg. Co., 112 U. S. 645.

Accordingly the liability resulting from the taking and use of this railroad was by implication contractual, involving under the constitution the payment of just compensation therefor. Congress could not by legislation modify the nature of this fundamental obligation and in fact has not attempted to do so. The Federal Control Act, preceded by proclamation of the President by which the railroads were taken, recognizes that the government's liability was of this nature.

The first paragraph of Section 1 of the Federal Control Act reads:

"That the President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads * * * is hereby authorized to agree with and to guarantee to any such carrier * * * that * * * it shall [fol. 22] receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal Control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen."

Whenever found possible to negotiate an agreement with a carrier, under the above paragraph, that agreement must fix the compensation to be paid for use of the railroad property upon an annual guaranteed basis, which terminology calls for a fixed sum in the nature of a rental and not an indeterminate amount to be based upon losses when and if they result from federal control. It does not appear in this record, but it is a matter of common knowledge that in pursuance of section 1 of the Federal Control Act, the contracts made by the Director General of Railroads with the carriers provided for compensation upon a fixed rental basis.

The agreement as to compensation called for in said section 1, it should be noted, is a voluntary one and the compensation thereunder is to be based generally upon the average annual operating income for the three years ended June 30, 1917, as a maximum. This three year period will hereinafter be referred to as the test period and said average annual income for said test period as the standard return.

Where no agreement has been reached between the carrier and the Director General, as is the situation in the case under consideration, the claim is to be submitted to a Board of Referees pursuant to Section 3 of said Act, which is the section under which this board functions. The portion of said section with which we are here concerned reads:

[fol. 23] "Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one."

To hold that an entirely different theory and method of compensation should be adopted for cases where the government has not reached an agreement with the carrier, from that authorized and used where an agreement with the carrier has been reached, would involve a strained construction of the statute. Unquestionably, as contended by respondent, the determination of just compensation under said section 3 is a judicial proceeding not in any way controlled by the maximum compensation fixed by Congress for the agreement provided for in section 1. However, without consideration of the Federal Control Act, it appears that compensation for the temporary taking and use of property in a military emergency would in a judicial proceeding be determined upon the theory of an implied lease and agreement to pay a fixed rental. In re Condemnation of Lands for Military Camp, 250 Fed. 315; Clifford v. United States, 34 Ct. Cls. 223; Pope v. United States, 26 Ct. Cls. 11; Johnson v. United States, 2 Ct. Cls. 391.

The Board finds that compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. Respondent's motion to dismiss is denied.

[fol. 24] What is the amount of just compensation, if any, to which plaintiff is entitled?

In our judgment there is insufficient evidence in the record upon which to arrive at a fair valuation of plaintiff's railroad properties and we will not therefore attempt to consider the percentage return upon the fair valuation in making our finding of just compensation for the use during the said six months' period. There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. In our opinion evidence of earning power offers the best measure for

our finding of the fair rental value of plaintiff's property in the claim under consideration. It appears, furthermore, that the rental value must be taken as of the commencement of federal control. United States v. Gill, 87 U. S. 517; Pope v. United States, 26 Ct. Cls. 11; Johnson v. United States, 2 Ct. Cls. 391.

Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions and in addition such as might be foreseen by reasonably intelligent business men can be given any weight in our conclusions. This is based on justice and sound reasoning, because the lessor of a [fol. 25] business would have no standing in court to urge a reduction in rental if the results of his own management showed a declining income, and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone. Accordingly our judgment of the rental value of the lease in this case must be based largely on the evidence before us of plaintiff's earning power prior to December 28, 1917. It is quite true, as respondent's attorney points out, that this Board is in no way bound by the standard return as a measure of just compensation. Nevertheless, it is worthy of our most earnest consideration that past earning power as evidenced by an average for a period of years was adopted as a basis of value in the Federal Control Act after long investigation and was the agreed measure in the standard contract entered into by the Railroad Administration and most of the carriers after many months of conference. However, such evidence of past earning power must be considered, together with any evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect the future revenues and expenses of a railroad.

Plaintiff's average annual net railway operating income for the three years of the test period, so-called, as certified by the Interstate Commerce Commission was $23,252, one-half of which is $11,626.00. The actual net railway operating income earned by the property for the first six months of 1918 was $1,897.43.

The following table shows plaintiff's net railway operating income for each of the years ended June 30, 1917, and the annual and semi-annual averages of the total thereof:

[fol. 26] June 30, 1912	$24,757.24
June 30, 1913	24,385.85
June 30, 1914	20,108.73
June 30, 1915	20,531.20
June 30, 1916	21,369.52
June 30, 1917	29,510.50
Total	140,663.04
Average 1 year	23,443.84
Average 6 months	11,721.92

It will be seen that there is very little variance between the income for an average six months of the six-year period ended June 30, 1917,

and that of an average six months of the test period or one-half the standard return.

Respondent submitted a statement showing the operating income and revenue tonnage of the plaintiff's railroad both prior and subsequent to federal control. In so far as said statement applies to the period prior to federal control it is properly given consideration, but not to show traffic conditions after January, 1918, or for the purpose of comparison with the first six months of 1918 which latter could not have been known at the time when federal control was instituted, our view being that we must place ourselves in the position of the parties at the time the implied lease was effected. All past and present operations and conditions on December 28, 1917, including matters from which deductions as to future income might be drawn, could under this rule be available for our consideration but not the actual figures of operations subsequent to that date. The county was at war, but what the effect of the war upon the income of the carrier [fol. 27] would be was highly problematical. Increased operating expenses were doubtless foreseen, but it might have been expected that freight rates would keep pace with them and a heavy movement of the chief commodities carried by plaintiff for military purposes, resulting in a large net income, might even have been anticipated; provided there had been no evidence at the time of a depletion of natural resources and curtailment of industries as a result thereof. Said exhibit considered for a period not later than January 1, 1918, shows a declining tonnage in the transportation of "products of forests" but on the other hand a very considerable increase in the carriage of "manufacturers." Under the headings "products of mines" and "other freight" the tonnage appears to have remained comparatively steady and the changes in totals of all classes of freight are not large enough to be significant. Knowledge of the fact that two mills had been closed was available to the parties but the evidence does not disclose whether the depletion of timber made it unlikely mills would start up at other points along the line of plaintiff's railroad under stimulus of war demand; and as an offset manufactured products were showing a substantial increase.

In view of the fact that the duration of Federal control could not be foretold on December 28, 1917, and the lease, therefore, was for an indeterminate period it is our opinion that the fair rental should be based upon an average of expected earnings for a period of years and not upon the immediate outlook for business for the first six months of 1918. Since plaintiff's operating income for the six years ended June 30, 1917, showed a six months' average of $11,721.92, its claim for compensation based upon the six [fol. 28] months' average for the three years ended June 30, 1917, amounting to $11,626.00 (one-half the standard return) is within the six months' average return that might have been expected of the property on December 28, 1917.

We find and report that Eleven thousand six hundred twenty-six dollars ($11,626.00) was and is just compensation, not including sums which may be found due on account of under-maintenance, to the plaintiff for the aforesaid use of its property

during the said period of Federal control. Actual net income for the first six months of 1918 earned by the property was $1,897.43 leaving an unadjusted balance of just compensation due the plaintiff of Nine thousand seven hundred twenty-eight and 57/100 ($9,728.57) dollars.

Has the board jurisdiction to hear and determine plaintiff's claims on account of deferred maintenance?

That the plaintiff was entitled, in addition to a reasonable rental for the use, to have its property "returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control" was recognized in the President's proclamation of December 26, 1917, and confirmed in the Federal Control Act, and we do not understand that the right in itself is challenged.

Section 3 of the Federal Control Act, which is the source of this Board's powers, reads:

"That all claims for just compensation not adjusted (as provided in section one) shall * * * be submitted to boards, [fol. 29] each consisting of three referees * * *. Said boards shall give full hearing to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated."

Paragraph 1 of said section 1, to which reference is made, authorizes the President to agree with any carrier that "it shall receive as just compensation an annual sum" for the use of its property during the period it is under Federal control, said sum not to exceed the standard return hereinbefore described. Paragraph 4 of said section 1 prescribes that the agreement shall contain adequate provisions for maintenance so that the carrier's property may be returned to it in as good condition as it was in at the beginning of Federal control and for reimbursements to the United States for additions and betterments not justly chargeable to the United States.

Respondent contends that the just compensation which the board is authorized to report is limited by said section 3 to the just compensation contemplated in paragraph 1 of section 1 above men- [fol. 30] tioned and that no jurisdiction is conferred upon the board to report the just compensation due the carrier in the event

of failure to maintain its property as contemplated by paragraph 4 of section 1.

The 5th amendment to the Constitution provides "nor shall private property be taken for public use without just compensation." As seen above a temporary taking of private property for public use is regarded as a lease by the government from the owner. Fundamental to a lease of this character is the right of the lessee to receive compensation for the use of his property and in addition to have it adequately maintained. In re Condemnation of Lands for Military Camp, 250 Fed. 314. This right, as we have said, does not appear to be challenged, but, on the contrary, is squarely recognized in said paragraph 4, section 1. It follows that a judicial determination of just compensation in its usual sense and as recognized by the Act must include compensation for a failure to maintain the property in case such failure is established. Section 3 of the Act, above quoted, provides for a judicial determination of just compensation by this board and unless the context clearly shows a contrary intention the term just compensation must be construed to be therein used in its full and usual sense.

The passage upon which respondent relies is that wherein the board is directed to report to the President "the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one." Paragraph 1 of said section 1 does relate exclusively to the just compensation for the use (annual [fol. 31] rental). But paragraph 4 of said section 1 relates to other rights. Moreover, that the annual compensation referred to in paragraph 1 is not the same as the just compensation referred to in section 3 is evidenced by the fact that Congress obviously recognized that the standard return which is legislated as maximum compensation for the voluntary agreement as to compensation in said paragraph 1 could not be fixed as a maximum for the judicial determination of compensation provided for in section 3.

To secure a full perspective, the question of jurisdiction to hear and determine plaintiff's claim on account of under-maintenance of its property should be viewed with reference to the surrounding facts. The Federal Control Act was passed effective March 21, 1918, and the early decisions rendered by previous boards appointed under section 3 were handed down while Federal control of the railroads was still in effect. During such control it was obviously impossible to compute the sum which would measure the amount by which the Government failed to return a particular property at the end of the control period in as good repair as when taken over. Accordingly the reports of many previous boards, of necessity, were limited to a finding of annual compensation for the use. Inasmuch, however, as such a finding was incomplete without a determination of the rule of maintenance, the findings of compensation in those cases were made subject to the carrying out of the provisions relating to upkeep of property contained in the standard contract between the Director General of Railroads and the carriers. There was no denial of jurisdiction by such

previous boards, as has been contended; on the contrary the fact that they did fix a rule of maintenance was an affirmation of jurisdiction of the subject matter. Following the termination of Federal control it has become possible to make an estimate, based upon established rules of railroad maintenance, as to the compensa-
[fol. 32] tion due the carrier in the event the Government had failed adequately to maintain its property.

Effective February 28, 1920, Congress passed the Transportation Act, which provided (Sec. 200 (a)) that Federal control of the Railroads should terminate at 12.01 a. m. March 1, 1920, and (Sec. 202) that as soon thereafter as practicable the President should "adjust, settle, liquidate and wind up all matters, including compensation, and all questions and disputes of whatsoever nature arising out of or incident to Federal control." Section 203, after providing for payments to carriers with which no contract fixing or waiving compensation had been made of the whole or so much of the estimated compensation as would meet fixed or corporate charges, reads:

"(b) The acceptance of any benefits by a carrier under this section:

(1) shall not deprive it of the right to claim additional compensation which, unless agreed upon, shall be ascertained in the manner provided in section 3 of the Federal Control Act;"

It must be assumed that in passing this Act Congress was fully alive to the conditions that would exist upon termination of Federal control; that it was cognizant of the fact that executory provisions for upkeep of property would be out of place in any agreement then made between the President and carrier and in the event that the carrier's property had not been adequately maintained it would have a just claim for compensation on account thereof. Accordingly the word compensation must be assumed to have been used in its full sense and it must be concluded that Congress intended the provi-
[fol. 33] sions of Section 3 of of the Federal Control Act to be construed from the standpoint of conditions existing at the end of Federal control.

In view of the fact that Federal control is terminated and any agreement now made would therefore no longer contain executory provisions for upkeep of the property and in view of the fact that the Transportation Act, as above quoted affirmatively determines any question as to the continuance of this board's powers following Federal control, the provisions of section 3 must be regarded and construed from the standpoint of their application to an executed agreement between the President and plaintiff. Referring, with this consideration in mind, to the opening passage of section 3 which precedes the passage upon which respondent bases his contention, it will be noted that "all claims for just compensation not adjusted (as provided in section one)" are to be submitted to boards of referees for consideration and report. Paragraph 4 of section 1, as has been seen, prescribes that the agreement authorized in section 1 shall

contain adequate provision for maintenance of the property. Therefore in case of inability of the parties to agree upon the proper provisions for maintenance under said paragraph or in the absence of any agreement, as is the situation in the case before us, a claim for "just compensation not adjusted (as provided in section one)" would exist in the event that property had not been adequately maintained.

It is true that an agreement with the carrier including the board's finding of compensation for failure to maintain is not the same as an agreement containing provisions for adequate maintenance; but section 3 does not contemplate that the agreement entered into following the board's report of just compensation shall be the same [fol. 34] as the agreement provided for in section 1; it merely provides that the President "may include therein provisions similar to those authorized under section one."

Consideration must also be given to the fact that section 3 makes the proceedings before the board a condition precedent to the right of the parties to invoke the jurisdiction of the Court of Claims and the amount of just compensation awarded and the facts found are made prima facie correct in said Court. Unquestionably Congress intended all items of plaintiff's claim for compensation to be considered by the board in order that a decision of the whole claim would be available for review by the Court of Claims in case either party desired such review.

In view of the above it is the opinion of the board that it has jurisdiction and clearly is its duty to consider and report upon plaintiff's claims on account of the alleged undermaintenance of its properties.

What is the amount, if any, to which plaintiff is entitled on account of under-maintenance of its property?

Plaintiff introduced direct testimony to the effect that its roadbed and equipment was not in as good condition at the end of Federal control as it was on January 1, 1918, which testimony was not contradicted by the respondent. Moreover, the fact that it is shown by the railway records that less was expended on maintenance of its property during the first six months of 1918 than expended during a semiannual average of the test period is corroborative of this evidence as to the relative physical condition of plaintiff's property on January 1, 1918, and on June 30, 1918. We accordingly find and report that plaintiff's property was not returned to it by the Govern- [fol. 35] ment following Federal control in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control.

No direct testimony was introduced to show the amount by which the roadbed and equipment failed to be in as good repair following Federal control but we apprehend that the introduction of such evidence can not be demanded in all cases, taking into consideration the fact that Federal control was instituted upon short notice in mid-winter and that a full comprehension of all that such control entailed was had by few, if any, at the commencement thereof. It is considered by the board that in the claim under consideration, the best measure of the amount of depreciation of the carrier's prop-

erty due to undermaintenance during the six months of Federal control is a measure based upon the difference between the expenditures for maintenance made during said control period and the expenditures for maintenance normally made by the carrier during a like period. The following table is primarly based upon the expenditures made by the carrier for maintenance during an average six months of the test period and the actual expenditures for maintenance during the control period, as shown by plaintiff's Exhibits 16 and 17, from which have been deducted such items as are considered to have been properly urged by the respondent (respondent's Exhibits 2 and 5) to be improperly charged to maintenance for the periods in question. Instead of applying a common equation factor to the total expenditures for the test period for the purpose of arriving at the difference in costs between the two periods, wherever comparable items have been found in both periods, the actual 1918 price has in the case of each item been applied to the quantity shown [fol. 36] to have been used during an average six months of the test period. This method has the merit of showing the exact appreciation in costs for the items in question, so far as the data before us permits, and since the total of comparable items in dollars and cents is considerably in excess of the total amount of the non-comparable items, although fewer in number, its application should more nearly work justice between the parties than the use of a common equation factor for all items. Upon the assumption that all items in an average six months of the test period would have normally occurred in the control period, the total of all such items, against which no similar items are shown in the control period, has been taken and to it has been applied a common equation factor. The factor used is based upon the difference in price for the test period and the actual 1918 price of all items shown for the average six months of the test period against which there are comparable items shown in the control period, and was arrived at by dividing the total expenditures for such items during said six months' test period into the total sum which would have been paid for the same quantities of such items at the 1918 price. For the reason that comparable items of materials are few the totals of all such items appearing both under "Ways and Structure" and "Equipment" have been used in determining a factor to be used for both. For the same reasons, and because of the fact that same items appearing in plaintiff's exhibits under the head of "materials" also include the labor involved in their application, we have considered it advisable to include the item "labor" in the totals upon which our figures are based.

	Six months' test period				Six months 1918, actual				Test period quantity at 1918 price
Foreman	6 mos.	$753.75=	1 mo.	$125.62 —	6 mos.	$1,050.00=	1 mo.	$175.00	$1,050.00
Labor	18,020 hrs.	2,343.11=	1 hr.	.13 —	15,037 hrs.	2,902.32=	1 hr.	.193	3,477.86
Ties	3,838	1,634.03=	1 tie	.425 —	2,117 ties	1,366.65=	1 tie	.646	2,479.34
Lumber	22,307 ft.	451.99=1,000	ft.	20.26 —	4,849 ft.	141.80=1,000	ft.	29.24	652.25
Wire fence	93 rods	33.92=	1 rod	.363 —	20 rods	9.00=	1 rod	.45	41.85
Salt	217 lbs.	1.15=	1 lb.	.0053—	280 lbs.	4.00=	1 lb.	.0143	3.10
Posts	80	17.42=	1 post	.218 —	10 posts	3.00=	1 post	.30	24.00
Shovels	10	8.75=	1 shovel	.875 —	1 dozen	15.00=	1 sho'l	1.25	12.50
		$5,244.12				$5,491.77			$7,740.90
Non-comparable items		197.07			(Equation factor 1.4344)				282.68
Non-comparable items		.....				1,484.16			.....
Superintendence		150.00				150.00			150.00
		$5,591.19				$7,125.93			$8,173.58
Deducting actual expenditures six months, 1918									7,125.93
Total									$1,047.65

Equipment

	Locomotive								
Superintendence	6 mos.	$150.00=1 mo.	$25.00 —	6 mos.	$210.00=1 mo.	$35.00	$210.00	
Labor	1,013 hrs.	258.13=1 hr.	.2548—	542 hrs.	157.43=1 hr.	.2905	294.27	
Castings	625 lbs.	12.51=1 lb.	.02 —	2,668 lbs.	124.74=1 lb.	.0467	29.18	
Driver Shoes	740 lbs.	23.60=1 lb.	.032 —	3,745 lbs.	153.60=1 lb.	.41	30.34	$563.79
		$444.24						
Non-comparable items		1,153.33			500.27			
Lap-over adjusted 1/6		26.57			Dr. 241.77			

Deductions:						
Copper ferrules Truck bolsters Air Hose Gasket	..... 1/6	7.80 22.50 16.17				
Flues		66.25	$1,067.18	Equation Factor	1.4344	$1,530.76
Cars						
Labor ..... 2,621 hrs.		$496.13=1 hr.	$.189 —3,203 hrs.	$692.17=1 hr.	$.216	566.13
Non-comparable items.....		1,032.43		492.04		
Lap-overs adjusted 1/6 Cr.....		18.49		Dr. 408.21		
		1,013.94		Equation factor	1.4344	1,454.40
		$3,137.49		$2,980.23		$4,115.08
Deducting actual expenditures six months, 1918.....						2,980.23
						1,134.85
Add Way and Structure.....						1,047.65
						2,182.50
Add Depreciation.....						2,514.87
Total						$4,697.37

[fol. 37] We find and report that four thousand six hundred and ninety-seven dollars and thirty-seven cents (4,697.37) is just compensation to the plaintiff on account of the failure of respondent to return its property in as good repair and complete equipment as it was in at the commencement of Federal control; and that the total amount of unadjusted just compensation due the plaintiff from the respondent is fourteen thousand four hundred and twenty-five dollars and ninety-four cents ($14,425.94).

Respectfully submitted, Daniel W. Knowlton, George M. Curtis, Charles V. Burnside, Referees.

September 30, 1922.

I, H. L. Kent, Clerk of the Circuit Court of Smyth County, do hereby certify that the following is a true and correct copy of the Seventh clause of the mortgage executed by the Marion & Rye Valley Railway Company to the Radford Trust Company of Radford, [fol. 38] Virginia, on the 1st day of January, 1902, securing an issue of $175,000.00 of first mortgage bonds:

"Seventh: If any default shall be made in payment of any of the said bonds, coupons, at the time and place when and where the same shall become payable, and such default shall continue for three months thereafter; or if the party of the first part shall fail to keep any of the other covenants herein contained or shall continue in such failure for three months after demand of compliance by the party of the second part, or its successors or successor, then, and in either of such cases, the said Radford Trust Company, as Trustee, on the request in writing of the holders of an aggregate par value of a majority in interest of said bonds then in force and so in default, upon being properly indemnified, may forthwith enter into and take possession of all and singular the said mortgaged property, rights, privileges and franchises, and use, operate, and manage the same for the benefit of all the holders of all the said bonds secured by this conveyance as hereinafter more particularly provided for; and if such default shall continue for the space of six months from the time of the happening thereof, and in any such case, the said trustee, either after or without entering upon and taking such possession as aforesaid, upon the request in writing of the holders of the bonds of an aggregate par value of a majority in interest, shall proceed to sell the said mortgaged premises, property rights, privileges, franchises and appurtenances, or so much thereof as may be necessary, at public auction in the Town of Marion, State of Virginia, after causing notice of time and place of such sale to be published weekly during the period of not less than two months prior thereto, in two newspapers of large circulation, published [fol. 39] in the State of Virginia, one of which at least shall be in the Town of Marion, and the party of the second part, may, in its discretion, adjourn such sale from day to day and time to time; but if such adjournment shall be made for more than ten days, a notice thereof shall be published in said newspaper at least once

before the day to which the sale is adjourned. On making the sale of the mortgaged premises and property, as aforesaid, the party of the second part shall execute and deliver to the purchaser or purchasers, a deed or deeds of transfer or transfers, which shall convey and transfer to him or them respectively a full and valid title to the property sold; and the recitals in said deeds or transfers of any of the above mentioned defaults, refusals to pay, or breach of covenants of any other act, omission of fact necessary to provide and authorize such sale, shall be as conclusive evidence of such default, refusal to pay, breach of covenant or other act or omission of fact as if the same had upon due inquiry upon legal proceedings fully ascertained and judicially declared and determined; and such deeds and transfers shall be a perpetual bar and estoppel to any claims or demands of the party of the first part, its successors, assigns, or stockholders, to the property which shall purport to be transferred or conveyed thereby. In lieu, however, of the aforesaid proceedings by entry into possession, or by the power of sale, the said party of the second part may in its discretion, in case of any default by the said party of the first part, in any of the payments, conditions or covenants, herein provided for and contained, foreclose the equity of redemption of the party of the first part and of all other parties having any legal or equitable rights or claims in, to or against the mortgaged premises and property or any part or parcel thereof, including all rights and franchises herein and hereby conveyed and appurtenant thereto, by pro-
[fol. 40] ceedings at law or in equity, provided for by laws of Virginia, in which the said mortgaged property lies, and in either of the Courts of such state or in the Circuit Court of the United States; it being distinctly understood and agreed that in the event of any sale by the trustees or trustee for the time being, by virtue of any power or powers herein conferred or otherwise acquired, or in the event of any sale under proceedings in foreclosure, the whole principal sums of each and all of the bonds then outstanding and unpaid, and intended to be secured hereby, shall thereupon forthwith become due and payable, notwithstanding the same may *be* by the terms of said bonds be payable at other times."

I further certify that the Radford Trust Company, the original trustee in the mortgage, has ceased to do business and has been dissolved under the laws of the State of Virginia. I further certify that Floyd L. Knight was substituted as trustee in accordance with the provisions of the mortgage on the 17th day of July, 1922, and that the following is a true copy of the order of the Board of Directors substituting Floyd L. Knight as trustee: as filed in the chancery cause of Knight, Trustee for Marion & Rye Valley Railway Company.

"Minutes of the special meeting of the Board of Directors of the Marion & Rye Valley Railway Company held at 318 Mutual Building, Richmond, Va., on July 17, 1922, at 10 o'clock a. m., pursuant to due and written notice given all the members thereof Present: F. Sitterding, W. H. Sitterding, H. G. Buchanan, and Holt S. Lloyd, being a majority of the Board.

[fol. 41] Mr. F. Sitterding presided and Mr. Lloyd recorded the minutes.

Mr. Lloyd presented and read a copy of the notice mailed July 12, 1922, to all the members of the Board calling this special meeting, which notice was ordered to be recorded at the end of these minutes.

Mr. Lloyd presented and read to the meeting a communication from the Virginia Trust Company, dated July 11, 1922, tendering its resignation, effective upon the appointment of its successor, as trustee in the mortgage of this Company dated January 1, 1902, given on all of its franchises and properties to secure an issue of $175,000 coupon bonds. On motion this resignation was accepted and ordered to be recorded with the minutes of this meeting.

Mr. Lloyd presented and read to the meeting a communication dated July 12, 1922, from Mrs. M. E. Knight, the holder of $105,000 of the coupon bonds dated January 1, 1902, requesting and approving the appointment by resolution of this Board of Floyd L. Knight, Esq., of Lynchburg, Va., as trustee in the mortgage dated January 1, 1902, in the place and stead of the Virginia Trust Company, resigned. It was ordered that this communication be made a part of the record of this meeting.

On motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, the Virginia Trust Company, which was on the 29th day of May, 1920, substituted as trustee in the mortgage dated the 1st day of January, 1902, given by this Company on its franchises [fol. 42] and properties to secure the issue of $175,000 of coupon bonds, did on the 11th day of July, 1922, tender its resignaton as said trustee aforesaid, effective upon the appointment of its successor; and

Whereas, the resignation of said Virginia Trust Company, trustees as aforesaid, has this day been accepted by this meeting and Mrs. M. E. Knight, the holder of $105,000 of the bonds issued under and secured by the aforesaid mortgage has requested and approved the appointment of Floyd L. Knight, Esq., of Lynchburg, Va., as trustee in said mortgage in the place and stead of the Virginia Trust Company, resigned; and

Whereas Section 10 of said mortgage provides, among other things, that:

"In case of the dissolution, resignation, or removal of said trustee, the party of the first part, shall, by resolution of its Board of Directors, with the approval in writing of the holders of at least

$100,000.00 of such bonds then in force and outstanding, thereupon choose or appoint a new trustee or trustees to supply such vacancy or place; and so from time to time, the place or places of such trustee or trustees shall be filled in such manner and without any discontinuance of the trust hereby created; and such new trustees shall forthwith on such appointment succeed to and be vested with all the estate, rights, powers, duties, responsibility and authority of a trustee or trustees, granted, confirmed, or imposed by these presents, without further assurance, conveyance, deed or transfer in writing, as fully and perfectly as if it, he, or they had been named in these presents as party or parties of the second part."

Therefore be it resolved, Floyd L. Knight, Esq., of Lynchburg, [fol. 43] Va., be and he is hereby substituted as trustee in the mortgage on the franchises and properties of the Marion & Rye Valley Railway Company dated the 1st day of January, 1902, and that he be and is hereby vested with all the estate, rights, powers, duties, responsibility and authority granted, confirmed or imposed by the aforesaid mortgage on the original trustee named therein.

On motion duly made and seconded, the following resolution was adopted:

Resolved, That the secretary be and he is hereby directed to send Mr. Floyd L. Knight a copy of the minutes of this meeting, together with all the papers made a part thereof, duly attested.

There being no further business, the meeting adjourned.

(Signed) Holt S. Lloyd, Secretary.

And I further certify that Floyd L. Knight, Trustee, filed his bill in the Circuit Court of Smyth County, Virginia, at First October Rules, 1922, default having been made in the payment of the principal of said bonds, asking that the said mortgage be foreclosed and he authorized as Trustee to take charge of all and singular the assets of the said corporation and I further certify that the following is a true and correct copy of a portion of a decree entered by said Circuit Court on the 18th day of January, 1923:

"It further appearing to the Court that the Marion & Rye Valley Railway Company has a claim against the United States of America in the amount of $14,425.94, as allowed by Referees of the Interstate [fol. 44] Commerce Commission, the Compensation Docket of said Commission, but that the Director General of Railroads has declined to pay the same and that in order to obtain payment thereof its allowance by the U. S. Court of Claims will be neqessary, the said Trustee is hereby authorized and directed to collect said funds and to employ counsel under a reasonable contingent fee agreement, subject to any burdens that are properly chargeable to said fund and to the approval of this Court in this cause, to prosecute the said last mentioned claim to collection if possible."

Given under my hand and seal of the Court this 27th day of April, 1923.

H. L. Kent, Clerk of Circuit Court of Smyth County. (Seal.)

[fol. 45] II. General Traverse—Aug. 1, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. History of Proceedings

On May 6, 1924, this case was argued and submitted by Mr. Ben B. Cain, for the plaintiff, and by Mr. A. A. McLaughlin, for the defendant.

On May 19, 1924, the court filed findings of fact and conclusion of law, with an opinion by Hay, J., and entered judgment against the plaintiff in the sum of $34.97, for printing of the record.

On May 26, 1924, the court filed an order amending the findings of fact.

On July 12, 1924, the plaintiff filed a motion for a new trial.

IV. Argument and Submission of Motion for New Trial

On January 12, 1925, the plaintiff's motion for a new trial was argued and submitted by Mr. Ben B. Cain, for plaintiff, by Mr. Milton C. Elliott, as amicus curiæ, and Mr. A. A. McLaughlin, for defendant.

V. Order of Court—Entered January 26, 1925

It is ordered by the Court this 26th day of January, 1925, that the plaintiff's motion for new trial be and the same is overruled.

It is further ordered that the former findings of fact, conclusion of law, and opinion be and they are vacated, set aside and withdrawn, and new findings of fact are this day filed with a conclusion of law dismissing petition. Opinion by Judge Hay.

[fol. 46] VI. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J.**—Entered January 26, 1925

This case having been heard by the Court of Claims upon a stipulation of the facts made between the parties signed by Ben B. Cain, plaintiff's attorney, and Robert H. Lovett, Assistant Attorney General, the court adopts the said stipulation and sets it out as follows as and for its

Findings of Fact

I

December 26th, 1917, the President of the United States issued the following proclamation, together with the following statement, to wit:

"By the President of the United States of America

"A Proclamation

"Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date of April 6, 1917, resolved:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

"And by joint resolution bearing date of December 7, 1917, resolved:

"That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hun- [fol. 47] garian Government; and that the President be, and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

"And whereas it is provided by section 1 of the act approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,' as follows:

"The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, and for such other purposes connected with the emergency as may be needful or desirable.

"And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation

of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war;

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession, and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned on controlled systems of coastwise and inland transportation engaged in general transportation; whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to [fol. 48] such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

"Until and except as far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

"Nothing herein shall be construed as now affecting the possession, operation, and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or opera-

tion may be taken of all or any part of such street railway system, including subways and tunnels; and by subsequent order and proclamation possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession, and control of which are hereby assumed.

"The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

"But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

"Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations.

"Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in [fol. 49] the conduct of their business as common carriers; but suits may be brought by and against such carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine.

"From and after 12 o'clock on said 28th day of December, 1917, all transportation system included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second. "Woodrow Wilson.

"By the President: Robert Lansing, Secretary of State. Newton D. Baker, Secretary of War."

Statement of the President

"I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so. This is a war of resources no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and the simplified method of coordination which have not proved possible under private management and control. The committee of railway executives who have been cooperating with the Government in this all-important matter have done the utmost that it was possible for them to do; have done it with patriotic zeal and with great ability; but there were difficulties that they could neither escape nor neutralize. Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings, and the committee was, of course, without power or authority to rearrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends.

"The public interest must be first served, and, in addition, the financial interests of the Government and the financial interests of the railways must be brought under a common direction. The [fol. 50] financial operations of the railways need not then interfere with the borrowings of the Government, and they themselves can be conducted at a greater advantage. Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment.

"The Secretary of War and I are agreed that, all the circumstances being taken into consideration, the best results can be obtained under the immediate executive direction of the Hon. William G. McAdoo, whose practical experience peculiarly fits him for

the service and whose authority as Secretary of the Treasury will enable him to coordinate as no other man could the many financial interests which will be involved and which might, unless systematically directed, suffer very embarrassing entanglements.

"The Government of the United States is the only great Government now engaged in the war which has not already assumed control of this sort. It was thought to be in the spirit of American institutions to attempt to do everything that was necessary through private management, and if zeal and ability and patriotic motive could have accomplished the necessary unification of administration it would certainly have been accomplished; but no zeal or ability could overcome unsuperable obstacles, and I have deemed it my duty to recognize that fact in all candor, now that it is demonstrated, and to use without reserve the great authority reposed in me. A great national necessity dictated the action, and I was therefore not at liberty to abstain from it.

"Woodrow Wilson."

III

Following said proclamation and statement, William G. McAdoo, named therein as Director General of Railroads, issued various general orders and circulars to the railroads generally, the following of which were received and complied with by the plaintiff, to wit:

"Office of the Director General of Railroads

"Washington, December 28, 1917.

"To the Presidents and Directors of All Railroad Companies:

"Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation. You are requested to make every possible effort to increase efficiency and to move traffic [fol. 51] by the most convenient and expeditious routes.

"I confidently count on your hearty cooperation. It is only through united effort, unselfish service and effective work that this war can be won and America's future be secured.

"W. G. McAdoo, Director General of Railroads."

"Director General of Railroads

"Washington, December 29, 1917.

"Order No. 1

"Pursuant to the order of the President of the United States, through the Secretary of War, the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President of which proclamation and order officers, agents, and employees

of said transportation systems are to take immediate and careful notice. In addition to the provisions therein contained, it is,

Until further ordered, directed that—

"1. All officers, agents, and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

"2. Any officer, agent, or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

"3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

"4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

"5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

"6. Through routes which have not heretofore been established because of short hauling or other causes, are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing, notice thereof shall by carriers or shippers or both be given at once to the director by wire.

"7. Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director.

"W. G. McAdoo, Director General of Railroads."

[fol. 52] "Office of the Director General of Railroads

"Washington, D. C., December 29, 1917.

"General Order No. 2

"To the Chief Executives of the Railroads:

"Pursuant to the authority vested in me by the President of the United States in his proclamation of December 26, 1917, wherein it was stated that for purposes of accounting, possession, and control

of the railroads shall date from 12 o'clock midnight on December 31, 1917, you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control.

"William G. McAdoo, Director General of Railroads."

"Director General of Railroads, Interstate Commerce Commission Building

"Washington, January 8, 1918.

"To all Railroad Officers and Employees:

"The Government of the United States having assumed possession and control of the railroads for the period of the present war with Germany, it becomes more than ever obligatory upon every officer and employee of the railroads to apply himself with unreserved energy and unquestioned loyalty to his work.

"The supreme interests of the Nation have compelled the drafting of a great army of our best young men and sending them to the bloody fields of France to fight for the lives and liberties of those who stay at home. The sacrifices we are exacting of these noble American boys call to us who stay at home with an irresitable appeal to support them with our most unselfish labor and effort in the work we must do at home, if our armies are to save America from the serious dangers that confront her. Upon the railroads rest a grave responsibility for the success of the war. The railroads can not be efficiently operated without the wholehearted and loyal support of everyone in the service from the highest to the lowest.

"I earnestly appeal to you to apply yourselves with new devotion and energy to your work, to keep trains moving on schedule time and to meet the demands upon the transportation lines, so that our soldiers and sailors may want for nothing which will enable them to fight the enemy to a standstill and win a glorious victory for united America.

"Every railroad officer and employee is now, in effect, in the service of the United States, and every officer and employee is just as important a factor in winning the war as the men in uniform who are fighting in the trenches.

[fol. 53] "I am giving careful consideration to the problems of railroad employees and every effort will be made to deal with these problems justly and fairly and at the earliest possible moment. There should be a new incentive to every one in railroad service while under Government direction to acquit himself with honor and credit to himself and to the country.

"W. G. McAdoo, Director General of Railroads."

"N. B.—The Director General of Railroads requests that the above statement be posted by all railroads."

[Western Union Telegram]

Washington, D. C., Jan. 18-18.

"L. A. Ambler, Gen. Mgr. Virginia Southern R. R., Marion, Va.:

"In view of the order of the fuel administration for a five day cessation of industrial activity in this territory for the purpose of accumulating and distributing an ample fuel supply I urge and direct that every possible effort be made by the railroads to move coal and cooperate to the minutia with the fuel administration for the accomplishment of the desired end. I hope that the officers and employees of the railroads will do their part so effectively that there may be no further occasion for the interruption of the industrial and normal activity of the Nation.

"W. G. McAdoo, Director General."

"Director General of Railroads, Interstate Commerce Building

Washington, March 25, 1918.

"General Order No. 14

"The committee on transportation, American Railway Association, having at the request of the director general submitted a report in connection with the Federal law. 'To save daylight and to provide standard time for the United States,' which becomes effective at 2:00 a. m., Sunday, March 31, 1918, the following instructions, based on such report, are hereby issued:

"First. At 2:00 a. m., Sunday, March 31st, all clocks and watches in train dispatchers' offices, and in all other offices open at that time, must be advanced one hour to indicate 3:00 a. m.

"Employees in every open office must, as soon as the change has been made, compare time with the train dispatcher. Clocks and watches in all offices at the first opening, at or after the time the change becomes effective, must be advanced to conform to the new standard time, and employees, before assuming duties in such offices, must, after the change is made, compare time with the train dispatcher.

"Second. Each railroad will issue necessary instructions and arrange for such supervision and check of the watches of its employees [fol. 54] as to insure that they have been properly changed to conform to the new standard time.

"Third. Owing to the varying conditions which will prevail on the railroads of the United States, it is not advisable to issue a uniform rule or order to cover the details involved in the movement of trains at the period the change in standard time becomes effective.

Therefore each railroad must adopt such measures as may be necessary to properly safeguard the movement of its trains on the road at the time of the change.

"W. G. McAdoo, Director General of Railroads."

"General Order No. 28

"Washington, D. C., May 25, 1918.

"Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and,

"Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.'

"Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 23, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibit' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

"Given under my hand this the 25th day of May, 1918.

"W. G. McAdoo, Director General of Railroads."

[fol. 55]

IV

It is agreed that the allegations in Paragraphs I, II, III, V, X, and XIII of plaintiff's petition filed herein shall be taken as true and that a true copy of the report of the board of referees appointed as alleged in paragraph X of said petition is attached as appendix thereto and same is made a part hereof by reference.

V

John P. Buchanan, a witness for petitioner, before board of referees, stated that at the beginning of Federal control he had general supervision of the management of the road and was substantially its managing director. Upon receipt of General Order No. 1 he had some doubt as to whether his road was intended to be taken under Federal control, and he then and there wired the director general and asked if the Marion and Rye Valley Railway was under Federal control and if he should observe the order. He received a reply from the director general directing him to obey the order.

Witness was not able to produce the director general's telegram at the trial, stating that said telegram had been taken by him along with certain letters and telegrams from the director general and left with the Interstate Commerce Commission in the month of June, 1918. The circumstances under which said telegram was thus left in possession of the commission were that there was some uncertainty in June, 1918, as to whether the Marion & Rye Valley Railroad should put into effect the increase in passenger fares and freight rates authorized by General Order No. 28 of the director general. The witness, as general counsel for petitioner, conferred with the Corporation Commission of the State of Virginia, whereupon the State Corporation Commission of Virginia wrote witness that petitioner was under Federal control; thereupon witness took the matter up with the Interstate Commerce Commission and on that occasion brought the said telegram and other correspondence to Washington and left the same with the Interstate Commerce Commission. That as a predicate for offering oral proof witness testified that the files of the Commission had been searched for the message in question but without success. A search of the files of the Director General of Railroads failed to disclose that such telegram had been received or answered by the director general.

VI

In connection with General Order No. 28, testimony was introduced before the board of referees showing that at the date of its issuance there was pending before the State Corporation Commission of Virginia an application for an increase in rates and the said commission refused to take action on the ground that it was without jurisdiction. The matter was then presented to the officers of the Railroad Administration and the Interstate Commerce Commission for instructions and acting under authority of the Interstate Commerce Commission and the director general the increases named in General Order No. 28 were put into effect by plaintiff.

Instructions were issued by H. C. Buchanan, vice president, and B. F. Buchanan, general counsel for plaintiff, to the auditor of [fol. 56] petitioner that increase of twenty-five per cent in all rates be put into effect as of June 25, 1918. At the conclusion of conferences with officer of the Railroad Administration and the Interstate Commerce Commission and as a result of such conferences,

H. G. Buchanan, general counsel for plaintiff, telegraphed the auditor from Washington, D. C., as follows:

"Have seen commission. You have authority to enforce 25% rate increase as of twenty-fifth instant until Federal control relinquished."

VII

General Order No. 27, commonly known as the wage order, issued by the Director General of Railroads May 25, 1918, pursuant to which wages of employees on railroads being operated by the Government under Federal control, were increased, was not made applicable to the railroad of plaintiff, and was not applied thereon. General Order No. 27 named the railroads to which it was applicable and did not name plaintiff.

VIII

On the third or fourth of July, 1918, plaintiff received from John Barton Payne, general counsel for the director general, the following notice, to wit:

"June 24, 1918.

"DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same.

"Very truly yours, (Signed) John Barton Payne.

"T. S. Ambler, Gen. Mgr. Marion & Rye Valley Ry. Co."

IX

In due course the plaintiff presented a claim to the Interstate Commerce Commission under section 204 of the transportation act of 1920 and the bureau of accounts of the commission in connection therewith advised plaintiff as follows:

"The commission has held for the purpose of computing the amount payable under section 204 of the transportation act of 1920 that the period during which the carrier operated its own railroad or system of transportation dates from the time its property was relinquished by the Railroad Administration in the manner provided in the Federal control act. As the property of your company was formally relinquished on June 24, 1918, it is held to have been under Federal control for the period from January 1, 1918, to June 24, 1918." Subsequent to this communication from the bureau of accounts the commission made an order which contained the following:

[fol. 57] "The Marion & Rye Valley Railway Company, a corporation of the State of Virginia, hereinafter termed 'the carrier' is a

steam railroad company which, during the full control period engaged as a common carrier in general transportation, operating a line of railroad between Marion and Sugar Grove, Virginia, a distance of seventeen and seven-tenths miles which connected with the Norfolk & Western Railway, a railroad under Federal control. It is therefore a carrier within the meaning of paragraph (a) of section 204 of the transportation act, 1920. The carrier was under Federal control from January 1, 1918, to June 30, 1918, inclusive, and is entitled to the benefits of section 204 for the period from July 1, 1918, to February 29, 1920, inclusive."

X

The Marion & Rye Valley Railway is standard gauge and interchanged traffic and equipment under the conditions usually pertaining between connecting railroads in the United States; it has always engaged in a considerable volume of competitive traffic. It connects at Marion with the Norfolk & Western Railroad and at Sugar Grove with the Virginia Southern Railroad, which latter road was and is operated by the same officials as operated the Marion & Rye Valley Railway. The Marion & Rye Valley and the Virginia Southern connected at Sugar Grove and formed a continuous line to the terminus of the Virginia Southern. During a portion of the test period the Virginia Southern extended to Fairwood, three miles from Troutdale. At Fairwood there was located a large lumber mill. In the year 1915 or 1916 this lumber mill ceased operating and was abandoned, and subsequently that portion of the track of the Virginia Southern extending from Troutdale to Fairwood was taken up. After said mill at Fairwood was abandoned no traffic of any consequence was received from Fairwood. While the Marion & Rye Valley Railway connected with the Norfolk & Western Railroad a large portion of its traffic came from the Virginia Southern, which traffic could be diverted to the Virginia Carolina Railroad, about twenty-five miles distant across the country. The country is rough but the bulk of the traffic comes from Grafton, Ash, and Allegheny Counties, equally accessible to the Virginia Southern and Virginia Carolina, and plaintiff could not get traffic out of that section except on a competitive basis because the Virginia Carolina rates are higher. Traffic off of the Virginia Southern moved over the plaintiff's railroad. The Virginia Carolina Railroad was under Federal control, being a part of the Norfolk & Western Railroad system.

XI

Plaintiff did not keep separate books during the period of alleged Federal control, but closed its books as of January 1, 1918, and continued to keep the accounts thereafter as directed by General Order No. 2, hereinbefore quoted.

XII

In 1899 the Marion & Rye Valley Railroad Company was sold under foreclosure proceedings to the petitioner, the Marion & Rye [fol. 58] Valley Railway Company which was incorporated February 3, 1900, under the general laws of Virginia. About 1906 the United States Spruce Lumber Company acquired all of the capital stock of the plaintiff. About 1916 said capital stock was purchased by F. Sitterding, C. B. Buchanan, and J. B. Buchanan, who are the present owners. At the time of acquiring the ownership of the capital stock of plaintiff the United States Spruce Lumber Company owned and operated a large lumber mill just outside of Marion, situated on the line of the railroad, and also owned and operated the large lumber mill at Fairwood, heretofore mentioned, at the then terminus of the Virginia Southern Railroad. Said lumber mill at Marion ceased operating in 1916 or 1917, about one year subsequent to the abandonment of said lumber mill at Fairwood.

XIII

It is agreed that from December 28, 1917, to July 1, 1918, the plaintiff's railroad had a net income of $1,897.43, which sum it retained for its own use; that during the aforesaid period it did not turn over any of its earnings to the Director General of Railroads or the United States; that from December 28, 1917, to July 1, 1918, the railroad transported the same character of traffic as it had transported prior thereto; that it did not serve any military camps and did not transport any troops or munitions of war during said period; that during said period there was no change in the manner or method of conducting the operation of said railroad.

During Federal control there was a diminution of car supply. It was not possible to get empty coal hoppers to ship products of the mines theretofore loaded in hoppers. Hoppers went in loaded with coal and were required to be shipped out empty. There was a general demand for such cars, and the conditions were no different than would have happened at other times of car shortage. Before Federal control the plaintiff was allowed to load out hoppers and was compelled to utilize box cars and flats for shippers of mineral and things of that kind.

There were no towns along the line of the Marion & Rye Valley Railroad between Sugar Grove and Marion. There were two villages, at which points there were plants, one a tanning plant, the other a working establishment. The tanning plant was in operation during the period that the plaintiff claims it was under Federal control.

The same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto; it never received any instructions from the Director General of Railroads applying to it individually. The Company received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained, other than those heretofore mentioned.

No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. The plaintiff from December 28, 1918, to June 29, 1919, continued to operate its road exactly as it had always operated it.

[fol. 59] XIV

Plaintiff's average railway operating income for the three fiscal years ended June 30, 1917 (called test period) as certified to by the Interstate Commerce Commission was $23,252.00, one-half of which is $11,626.00. The actual net railway operating income earned by the property from January 1, 1918, to July 1, 1918, was $1,897.43, which amount was $9,728.57 less than its average net income during the said test period. The character of traffic transported by plaintiff and the tonnage thereof for the following periods were as follows:

Tonnage of products of forest:

For six months of test period average was.....	51,917 tons.
For first six months of 1918 was ..... (A decrease of 70.5 per cent.)	15,301 tons.
For calendar year 1916 was	128,889 tons.
For calendar year 1917 was	73,815 tons.
For calendar year 1918 was	33,421 tons.
For calendar year 1919 was	46,914 tons.
For calendar year 1920 was	10,623 tons.

Total tonnage of all revenue freight:

For one-sixth of the test-period was	78,937 tons.
For six months of 1918 ..... (A decrease of 38.58 per cent.)	48,479 tons.
For calendar year 1917 was	170,772 tons.
For calendar year 1918 was	90,622 tons.
For calendar year 1919 was	99,043 tons.
For calendar year 1920 was	48,829 tons.

Tonnage of manufacturoes:

For calendar year 1917 was	69,937 tons.
For calendar year 1918 was	32,397 tons.
For calendar year 1919 was	29,318 tons.
For calendar year 1920 was	19,892 tons.

Plaintiff's railway operating revenue for the following periods was as follows:

Year ended June 30, 1915	$72,570.54
Year ended June 30, 1916	83,708.08
Year ended June 30, 1917	87,978.59
First six months 1918	29,328.48
Calendar year 1918	62,247.41
Calendar year 1919	67,751.56
Calendar year 1920	63,344.16

XV

The plaintiff charged on its books for depreciation of equipment during the test period, the following amounts:

For year ending June 30, 1915	$7,097.40
For year ending June 30, 1916	7,097.40
For year ending June 30, 1917	894.42

A total for the three years of $15,089.22, or a yearly average of $5,029.74, or a six months' average of $2,514.87.

The board of referees adopted such six months' average as basis for arriving at the item of $2,514.87, described as "Depreciation" in tabulated statement on Sheet 15 of its opinion, and constituting a portion of the amount allowed by the board of referees for failure to return the property of plaintiff in as good condition as on Janu- [fol. 60] ary 1, 1918. The said amount of $15,089.22 depreciation was charged on plaintiff's books in accordance with rules and regulations of the Interstate Commerce Commission in reference to accounting, which rules and regulations are made a part hereof, without copy attached. No evidence of actual depreciation was submitted to the board of referees and said board relied entirely upon the charges made by plaintiff in its books, as aforesaid.

XVI

Defendant concedes that plaintiff's property in controversy was undermaintained during the period January 1 to July 1, 1918, as compared with like six months during the test period and that the amount of such undermaintenance, aside from depreciation, is the amount found by the board of referees, to wit, $2,182.50.

Conclusion of Law

On the foregoing facts the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that its petition be and the same is hereby dismissed. Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be determined by the clerk, and to be by him collected according to law.

Opinion

Hay, Judge, delivered the opinion of the court:

This case is before us on a motion for a new trial made by the plaintiff. In that motion it is conceded that the findings of fact heretofore found by the court are correct; but the plaintiff contends that the court erred in its conclusion of law. Upon the facts found the court is of the opinion that its conclusion of law is correct, and therefore adheres to its former opinion which was as follows:

This is a suit to recover the sum of $14,425.94, the amount of an award made by the board of referees duly appointed by the Interstate Commerce Commission under section 3 of the Federal Control Act, 40 Stat. 451, and the Transportation Act of 1920, 41 Stat. 456, as the just compensation of the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ending June 29, 1918. The Director General of Railroads having refused to accept the report of the board of referees as a basis for settlement the plaintiff filed its petition in this court as provided by law.

The finding of the amount of the award for just compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the Government of the plaintiff's property for public use.

The first question which is presented for our consideration is, Did the Government take possession of the railroad of the plaintiff and operate and control it for the public use?

[fol. 61] It is not always necessary that in order to constitute a taking the property should be absolutely taken. If there is a serious interruption to the common and necessary use of property such an interruption may be equivalent to the taking of it. But there must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. These principles are particularly applicable in cases where the alleged taking is for the use of the property for a time, and not the taking of the title. There can be no taking of private property for public use unless there is possession and use thereof for public purposes, evidence by some act which deprives the owner of the use, possession, control and operation of his property. A mere declaration of an intention to take can not constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it can not be said that there is a taking within the meaning of the Constitution.

The plaintiff in this case in order to establish a taking relies upon the proclamation of the President and certain orders which the Director General of Railroads sent to it during the period when the plaintiff alleges that its property was under the control of the Government. The proclamation was issued by the President

on December 26, 1917, and provided "that the possession, control, operation, and utilization of such transportation systems * * * shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads," and "that from and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice." The possession, control, operation, and utilization to be exercised by the Director General of Railroads in accordance with the proclamation meant that possession must be at least of such a character as to deprive the owner of its control and operation, and that the owner of the property could no longer use it for its own purposes.

The proclamation by itself did not constitute a taking. If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of the property. The contention of the plaintiff that its property was taken by virtue alone of the proclamation of the President can not be sustained.

The plaintiff, however, relies further upon certain general orders sent out by William G. McAdoo as Director General of Railroads as evidencing the intention of the Government to take its property [fol. 62] and as showing that its property was actually taken. Some of these orders were sent to the plaintiff; many of them were not sent to the plaintiff.

Among those sent to the plaintiff was General Order No. 1, dated December 29, 1917, which is addressed to "All concerned," and declares that the Director General of Railroads "has taken possession and assumed control of certain transportation systems described in the proclamation of the President." The receipt of this order by the plaintiff did not constitute a taking of the plaintiff's property. It did not by its terms signify or state that the property of the plaintiff was being taken possession of. It contained nothing which ousted or tended to oust the property of the plaintiff from its control. There were no instructions in the order which caused the plaintiff to change the management and operation of its property. The plaintiff was not deprived of or circumscribed in any way in the use and enjoyment of its property.

The plaintiff also received General Orders Nos. 2, 14, and 28, and two circulars, but none of these interfered in any way with the control and operation of its property by the plaintiff. During the whole period for which the plaintiff claims compensation for the taking and use of its property the plaintiff had absolute control of it. By the testimony of its own general manager it appears that the plaintiff continued to operate its road from December 26, 1917, to June 29, 1918, exactly as it always had operated it. No possession of it was taken, no control over it was exercised, and no use of it was made by the Government at any time. Under this state of facts it is difficult to perceive how a taking of this property for public use can be deduced.

The plainitff seems to rely upon the following letter, which it argues shows that the Government had to have possession in order to relinquish it. The letter is as follows:

DEAR SIR:

It is not clear whether the Marion & Rye Valley Railroad Company has at any time been under Federal control. To remove any possible question, this order is issued definitely relinquishing same.

Very truly yours, John Barton Payne.

Mr. T. S. Ambler, General Manager Marion & Rye Valley Ry. Co.

The letter shows on its face that the general counsel of the Railroad Administration did not believe that the property of the plaintiff was under Federal control, and the letter had for its object the removal of any possible question about the matter.

After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public use the court is of opinion that no taking is shown which comes within the meaning of the Constitution and the law. It follows that the plaintiff can not recover.

It may not be amiss, however, to point out that even if the Government may be said to have had technical control of plaintiff's property, yet that control was not of such a character as would entitle the plaintiff to compensation.

[fol. 63] The plaintiff insists that both the President and the Congress provided for the compensation to which the railroads under Federal control would be entitled, the President in his Proclamation and the Congress by the act of February 28, 1920, 41 Stat. 456, and the act of March 21, 1918, 40 Stat. 451. Without going into the method of compensation set out in the statutes it is sufficient to say that the question of compensation is a judicial question, and just compensation must be determined by the evidence produced before the court. The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute. The just compensation to be awarded is to be measured by the loss caused to the property by the taking. The plaintiff in this case is entitled to receive the value of what it has been deprived, and no more. "To award it less would be unjust to it, to award it more would be unjust to the public." Bauman v. Ross, 167 U. S. 548, 574. The question is what has the plaintiff lost? If it has lost nothing it would be gross injustice to require the United States to pay something for nothing. What has the plaintiff lost by the supposed taking? There is no proof that it has lost anything thereby. Its propery has never been out of its own control. It operated it without let or hindrance by the Government during the entire period for which it is claiming that the Government had possession of it. If any loss was incurred during that time it was the result of the plaintiff's own operation and control of its own property.

All the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which

were taken possession of by the Government and actually operated and controlled by it. Surely Congress never intended that the United States should pay for the losses or depreciation of properties which the Government did not operate, did not control, did not use, and did not take possession of. For instance, provision is made in the statute for "adequate provision for maintenance of the property." Surely this can only mean adequate provision for maintenance of property in the control of and use by the United States. If the plaintiff did not adequately maintain its property while it was in its own possession and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay the plaintiff for the maintenance of its property?

Other reasons are advanced by the plaintiff, and supported by the findings of the board of referees, as to why compensation should be awarded the plaintiff in this case. It is not deemed necessary to recite these reasons which are not sufficient to combat the plain and uncontradicted evidence that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical control of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made. We think that the property of the plaintiff was not taken by the Government. If there was technical control of the property by the Government it was of such a character that it did not cause any loss to the plaintiff, and does not justify the award of any compensation.

[fol. 64] The plaintiff, however, contends now, for the first time, that if it is not entitled to recover under the act of March 21, 1918, 40 Stat. 454, it is so entitled under section 204 of the act of February 28, 1920, 41 Stat. 460.

Section 204 (c) provides as follows:

"As soon as practicable after March 1, 1920, the commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if, any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): Provided, That 'test period return' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation."

Section 204 (d) provides as follows:

"For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the commission shall then ascertain (1) the difference between its Federal control return, if deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if any income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier."

It will be observed that what the statute provides for is a deficit to be paid to railroads not under Federal operation, which deficit is to be ascertained in the manner provided for in that act.

In this case there is no proof that the plaintiff had a deficit. The case of the plaintiff is based upon the Federal control act, and the compensation which it is suing for is the compensation which that act provides for. It has no relation to the guaranty which is alleged to have been made by Congress in the transportation act of 1920, and no proof was offered by the plaintiff and no steps have been taken by it to bring itself under the provisions of the latter act. That being so this court can not undertake to pass upon the question whether the plaintiff is or is not entitled to recover under the provisions of the transportation act of 1920.

The motion of the plaintiff for a new trial must be denied, and its petition must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 65] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 26th day of January, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Thirty-four dollars and ninety-seven cents ($34.97), for printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VIII. Petition for Appeal—Filed February 19, 1925

From the pudgment rendered in the above-entitled cause on the 26th day of January, 1925, in favor of the defendant, the plaintiff, by its attorney, on the 18th day of February, makes application for and gives notice of an appeal to Supreme Court of the United States.

Ben B. Cain, Attorney of Record.

IX. Order Allowing Appeal

It is ordered by the Court this 2d day of March, 1925, that the plaintiff's application for appeal be and same is allowed.

[fol. 66] In Court of Claims of the United States

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 9th day of March, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,956. Court of Claims. Term No. 315. Marion & Rye Valley Railway Company, appellant, vs. The United States. Filed March 16th, 1925. File No. 30,956.

INDEX

PAGE

Jurisdictional Facts 1
Statement of the Case 2
Facts Material to Consideration of Question Presented 2
(1) Description of Appellant 2
(2) President's Proclamation 3
(3) Appointment of Director General 3
(4) Director General's letter of December 28, 1917 5
(5) Order No. 1, United States Railroad Administration 5
(6) Order No. 2, United States Railroad Administration 6
(7) Director General's Statement of January 8th, 1918 7
Argument 8
Did the Government take Possession of Appellant's Railroad. 8
What the Court of Claims Holds 8
The Federal Control Act 22
Did Congress Exceed its Powers in the Transportation Act... 29
Facts Showing Appellant's Road was Operated under Federal Control 31
Compensation 37
Measure of Compensation 43
Appendix 54

TABLE OF CASES CITED, ETC.

PAGE

Bauman vs. Ross, 167 U. S. 548-574 ..... 45, 51
Bigby vs. United States, 188 U. S. 400 40
Carpenter vs. United States, 17 Wall. 493 48
Chappell vs. United States, 160 U. S. 499 31
Duckett, A. W. & Co. vs. United States, 45 S. C. Rep. 38 ..... 10, 37, 42
Advance Case No. 108, decided November 17, 1924.
Federal Control Act, 40 Stat. 451 ..... 2, 24, 46
Johnson's Case, 2 Ct. of Cls. 291 49
Judicial Code, Sections 145, 242 1
Koshkoning vs. Burlon, 104 U. S. 668 31
Marbury vs. Madison, 1 Cranch 137 31
Monongahela Nav. Company vs. United States, 148 U. S. 312 30, 31, 51
Northern Pacific Railway Company vs. State of North Dakota, 250 U. S. 135 ..... 10, 15
Pope vs. United States, 26 Ct. Cls. 11 48
Portsmouth Harbor Land & Hotel Company vs. United States 250 U. S. 1, 250 U. S. 2, 43 S. Ct. Rep. 135 ..... 15, 16
Seaboard Air Line Railway Company vs. United States, 261 U. S. 299, 306 51
Shoemaker vs. United States, 147 U. S. 282 30
Transportation Act, 1920, 41 Stat. 456 ..... 2, 29, 46
Union Bridge Company vs. United States, 204 U. S. 364 31
United States vs. Benedict, 261 U. S. 294, 298 51
United States vs. Claflin, 97 U. S. 546 31
United States vs. Gettysburg E. Railway, 160 U. S. 660 30
United States vs. Gill, 87 U. S. 517 51
United States vs. Great Falls Manufacturing Co., 112 U. S. 645 41
United States vs. New River Col., 262 U. S. 341, 344 51
United States vs. North American Company, 253 U. S. 330 51
United States vs. Palmer, 128 U. S. 262 41
United States vs. Russell, 13 Wall, 623 ..... 18, 41
Vogelstein & Company vs. United States, 262 U. S. 337, 340 51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 315.

MARION & RYE VALLEY RAILWAY CO.,
Appellant,

vs.

THE UNITED STATES.

Jurisdictional Facts.

This is an appeal from a decision of the Court of Claims. The judgment to be reviewed is dated January 26, 1925, and is to the effect that Appellant is not entitled to recover any sum in this action of and from the United States and that petition herein be and the same hereby is dismissed.

On January 26, 1925, when order of Court was entered, the Court also entered its findings of fact, conclusion of law and opinion. (R. 26.)

On February 19, 1925, plaintiff made application for and gave notice of Appeal to the Supreme Court (R. 47) and on March 2, 1925, the application for Appeal was allowed. (R. 47, Judicial Code Sections 145 and 242.)

Statement of the Case and Facts Material to the Consideration of Questions Presented.

This case, correctly set forth in the opinion of the Court of Claims, is "a suit to recover the sum of $14,425.94, the amount of an award made by the board of referees duly appointed by the Interstate Commerce Commission under Section 3 of the Federal Control Act, 40 Stat. 451, and the Transportation Act of 1920, 41 Stat. 456, as the just compensation of the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ending June 29, 1918. The Director General of Railroads having refused to accept the report of the board of referees as a basis for settlement the plaintiff filed its petition in this court as provided by law." (R. 42.)

The case turns largely, if not entirely, upon the legal effect of the President's proclamation of December 26, 1917, and the acts and orders of the Director General in connection therewith in December, 1917, and the early part of the year 1918.

Important facts material to a complete understanding of the controversy are the following:

(1). December 28th, 1917, appellant was a common carrier engaged in general transportation, operating a steam railroad approximately twenty-two miles long, extending from Marion to Sugar Grove in the State of Virginia, where it connected with the Virginia Southern Railroad, then under the same management and ownership.

Appellant's railroad also connected with the Norfolk & Western Railway at Marion, Va., and received traffic from the Virginia & Carolina Railroad, a subsidiary of the Norfolk & Western Railroad System, through its connection with the Virginia Southern. (R. 6.)

(2). December 26th, 1917, the President of the United States issued a proclamation amongst other things declaring:

> "I * * * do hereby, through Newton D. Baker, Secretary of War, take possession, and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation; * * * * * to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." (R. 28.)

(3). Said proclamation designates and appoints William G. McAdoo as Director General

with authority to assume possession, control and operation of the transportation systems therein mentioned and declares that—

> (a) "Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation.
>
> (b) "Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies." (R. 28.)

and said proclamation concludes in the following language:

> "From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. * *" (R. 29.)

Simultaneous with this proclamation, the President issued a statement to the public setting forth his reasons for taking over the transportation systems and assuring the owners of such systems of his intention to recommend that Congress make certain definite guarantees, to which statement we shall make further reference later on. (R. 30.)

(4). December 28, 1917, William G. McAdoo, named as Director General in the proclamation, issued a circular letter, copy of which was received by appellant, addressed "To the Presidents and Directors of all Railroad Companies" which in part is as follows:

> "Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation." (R. 31.)

(5). Following the foregoing, on December 29th, 1917, the Director General issued Order No. 1, copy of which was received by appellant, declaring that pursuant to the order of the President, "the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President of which proclamation and order officers, agents, and employees of said transportation systems are to take immediate and careful notice" and in said order it is specifically directed, amongst other things, that—

> "1. All officers, agents, and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.
>
> * * * * *

"3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

"4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

"5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

"6. Through routes which have not heretofore been established because of short hauling or other causes, are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing, notice thereof shall by carriers or shippers or both be given at once to the director by wire.

"7. Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director." (R. 32.)

(6). On the same date as Order No. 1, namely, December 29th, 1917, the Director General issued Order No. 2, copy of which was sent to ap-

pellant, addressed "To the Chief Executives of the Railroads," which in part is as follows:

> " * * * you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control." (R. 33.)

(7). January 8, 1918, the Director General issued a statement, copy of which was received by appellant, addressed "To All Railroad Officers and Employees," with the request that it be posted by all railroads, which amongst other things declares as follows:

> "Every railroad officer and employee is now, in effect, in the service of the United States, and every officer and employee is just as important a factor in winning the war as the men in uniform who are fighting in the trenches." (R. 33.)

Appellant contended in the Court of Claims (1) that the President's proclamation and these acts and orders of the Director General had the effect to subordinate appellant's property to the use and control of the Government and conscripted

the officers and employees thereof as agents of the Government to operate the same, hence appellant is entitled to compensation; and (2), that there being nothing in the record to overturn the report of the board of referees as to the amount of compensation justly due and payable to appellant, the Court of Claims should have given judgment for the amount awarded by the referees.

The Court of Claims holds that the property of appellant was not taken by the Government and if there was technical control of the property by the Government it was of such a character that it did not cause any loss and does not justify the award of any compensation. (R. 45.) Appellant challenges the correctness of these conclusions and respectfully submits the case to this Honorable Court for its consideration and determination.

ARGUMENT.

(1) DID THE GOVERNMENT TAKE POSSESSION OF APPELLANT'S RAILROAD?

A careful reading of the opinion of the lower court compels the conclusion that little or no importance was attached by that court to the proclamation of the President and the action and orders of the Director General above referred to.

The Court seems to follow two lines of argument. In one part of its opinion the Court asserts that the proclamation by itself did not constitute a taking, and in another, that if there was technical control it was of such a character that

it did not cause any loss to the plaintiff and does not justify the award of compensation. As to the first it says:

> "If no other step had been taken and no agent of the President had done anything to carry into effect the proclamation of the President it would certainly not have been regarded as a taking of the property."

The Court recognizes that the President did act through an agent and in regard to the action of the Director General the Court, after quoting language of General Order No. 1, which it points out is addressed to all concerned and declares the Director General *has* taken possession and assumed control of certain transportation systems described in the proclamation of the President then proceeds to say:

> "The receipt of this order by the plaintiff did not constitute a taking of the plaintiff's property. It did not by its terms signify or state that the property of the plaintiff was being taken possession of."

The lower Court in this line of reasoning seems to have taken no account of the fact that the President in his proclamation, in the concluding paragraph thereof, declares that "after twelve o'clock on the said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director with-

out further act or notice," and the court seems to have overlooked the equally important fact that both the President and the Director General instructed that the properties be operated by the same officers and employees as was then being done and in the name of the respective companies.

This phase of the controversy seems to have been decided by the Supreme Court in Northern Pacific Ry. Co. *vs.* State of North Dakota, 250 U. S. 135, and in A. W. Duckett & Company *vs.* United States which was an appeal from the Court of Claims decided November 17th, 1924, 45 S. C. Rep. 38. In the former case the Supreme Court after referring to the proclamation of the President and the duties of the Director General thereunder, says:

> "Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General."

The court then quotes from the Act of March 21, 1918, commonly called the Federal Control Act, and proceeds to say:

> "Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned pro-

visions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the Government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty."

Again the court says:

"No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question."

This case furthermore holds that the Federal control and operation of railroads worked a fundamental change authorizing the President to prescribe rates, etc., to which I shall allude in another part of this argument.

No one has disputed or would dispute that the railroads of the United States (generally speaking), were taken under Federal control from the date of the President's proclamation and the notice of the Director General thereunder and that they continued to be operated in accordance with the order of the Director General obviously intended to put into execution the President's proclamation.

It was not humanly possible for the President to exercise the powers conferred upon him by law in any other way. He could not take actual personal possession of several hundred railroad systems, located in forty-eight states and aggregating hundreds of thousands of miles, except in the manner this was accomplished, namely, by an unequivocal declaration that the properties were taken under Federal control at a definite date and that the persons then operating the properties should continue to do so until further order from him or the Director General.

If any one of the railroad systems of the United States were taken into Federal control and operation, how can it be said that all other railroads covered and included in the language used by the President and Director General were not likewise taken? The intention of the President, as well as the Director General, was that (using the precise language of the Director General) the Presidents and Directors of all railroad companies would "unless otherwise ordered continue the operation of their (your) road in conformity with such proclamation."

It thus appears that even though it be admitted for the sake of the argument that the proclamation of the President on December 26th, which announced that the carriers would be conclusively deemed within the possession and control of the Director General therein appointed without further act or notice, did not of itself constitute an immediate taking of the property, certainly the act of the Director General above pointed out,

which drafted the Presidents and Directors of all railroad companies as agents of the Government, was an actual and definite act taking over and appropriating the property of all carriers engaged in general transportation for such use as the Government might see fit to make of them.

It will be observed that the opinion of the Court of Claims does not take notice of the order of the Director General dated December 28th, 1917, but quotes from General Order No. 1 to the effect that the Director General "has taken possession and assumed control of certain transportation systems described in the proclamation of the President" and that the receipt of this order did not constitute a taking of plaintiff's property. The court in this connection says:

> "It (meaning General Order No. 1) contained nothing which ousted or tended to oust the property of the plaintiff from its control. There were no instructions in the order which caused the plaintiff to change the management and operation of its property. The plaintiff was not deprived of or circumscribed in any way in the use and enjoyment of its property."

With all due deference to the Honorable Court below, I insist that this conclusion is erroneous. In the first place, while it may be admitted that General Order No. 1 did not by its own terms signify or state that the property was being taken possession of, nevertheless when it is interpreted in the light of the general order or circular of

December 28, 1918, it necessarily in connection with the proclamation had the cumulative effect of immediately ousting the property of the plaintiff from corporate control and subordinated it to the uses of the Government. In the second place, this order necessarily circumscribed the use and enjoyment of the properties because the declarations and acts of the President and the Director General instantly revolutionized the railroads of continental United States into a national transportation system which not only subordinated their managements to Government control but in express terms declared that (1) the common and national needs should in all instances be held paramount to any actual or supposed corporate advantage; (2) required all terminals, equipment and facilities of every kind to be utilized without regard to ownership; (3) compelled the carriers to disregard the routes designated by shippers; and (4) in legal effect abolished traffic agreements between carriers and made revolutionary changes with regard to the establishment of through rates.

From the time the officers and employees of the various carriers were thus declared to be agents of the Government the properties were necessarily held and operated as parts of the national system completely subordinated to whatever use the Government might see fit to make of them or whatever control the Government might see fit to exercise.

It is worthy of note that the conversion of individual carriers into a national system not only circumscribed the management and operation as

already pointed out, but also diminished traffic density and earning power of some carriers, while increasing that of others. It is also a fact that notwithstanding the costs of operation were increased the carriers could not, without direction from the Government, apply to the Interstate Commerce Commission or otherwise procure such increases in rates as were absolutely necessary to compensate for the diminished tonnage and the increased cost of operation, and it was in recognition of this very fact that Congress subsequently enacted Section 204 of the Transportation Act of 1920.

The power to initiate rates is expressly conferred upon the President in the Federal Control Act, Section 10, but if there had been no such enactment the Court knows that a carrier which came within the meaning of the declaration of the President and Director General above mentioned, could not without direction or order from the Government initiate any increase in rates. See Northern Pacific Railway *vs.* North Dakota *supra*, wherein the court amongst other things holds that the Director General had been clothed with "complete and undivided power to fix rates."

A case which seems to be peculiarly applicable to the facts in this case is Portsmouth Harbor, Land & Hotel Company *et al vs.* The United States, 43 Sup. Ct. Rep. page 135. That is a case where the Government merely subordinated the property of the Hotel Company in an indirect manner. The Hotel Company owned an island lying west of the entrance to Portsmouth Harbor and

bordering on the ocean. Adjoining this island to the north and west is land of the United States upon which the Government erected a fort, the guns of which have a range over the sea front of the claimant's property. The case was tried and carried to the Supreme Court three times before the last decision was made.

In the first case (250 U. S. 1) it was decided that the mere erection of the fort and the fact that the guns were fired over the claimant's land on two occasions about two years and a half before the suit was brought, coupled with the apprehension that the firing would be repeated, but with no proof of intent to repeat it other than the facts stated, did not require the finding of an appropriation and a promise to pay by the United States.

The second case (250 U. S. 2) was like the first, except for some occasional subsequent acts of gun fire, and the finding of the Court of Claims was again sustained.

The case finally went to the Supreme Court upon demurrer and the Supreme Court, in passing upon the sufficiency of the petition at which the demurrer was aimed, declares that the acts alleged would have the effect of imposing such a servitude as would constitute an appropriation of property by the Government for which compensation should be made.

The court says *inter alia*:

> "The question therefore is not what inferences should be drawn from the facts may be proved but whether the allegations if

proved would require or at least warrant a different finding from those previously reached. There is no doubt that a serious loss has been inflicted upon the claimant as the public has been frightened off the premises by the imminence of the guns; and while it is decided that that and the previously existing elements of actual harm do not create a cause of action, it was assumed in the first decision that—

> 'If the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea, to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.'

"That proposition we regard as clearly sound. * * *

"As the United States built the fort and put in the guns and the men, there is little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen. If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not. The repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire

> when the United States sees fit, even if not infrequently, or they may be explained as still only occasional torts."

The case of United States *vs.* Russell, 13 Wall. 623, is peculiarly similar to the instant case in that the property remained in actual control of the owners, the purpose of the Government in giving notice to the owners being to subordinate certain steamboats to Government purposes if and when it became necessary. The property was subordinated to the Government's use through a letter from a Government officer to the owner of the boats reading as follows:

> "Imperative military necessity requires that you make no arrangement for private freight without first consulting this office and obtaining permission in writing so to do."

In the decision of the Court of Claims, from which an appeal was had to the Supreme Court, the lower court found that when the steamers were taken into the service of the United States the officers acting for the Government—

> "did not intend to appropriate these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed and to pay a reasonable compensation for such services and such was the understanding of the claimant; * * *"

The Supreme Court affirmed the decree of the Court of Claims, amongst others things saying:

> "Unexplained and uncontradicted the findings of the Court show a state of facts which plainly lead that the emergency was such that it justified the officers in each case in ordering the steamboats into the service of the United States. Such a taking of private property by the Government under the circumstances is everywhere regarded as justified and private rights under such extreme and imperious circumstances must give way for the time being for the public good, but the government must make full restitution for the sacrifice.
>
> "Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owners for the use of the steamboats and for his own services and expenses and for the services of the crews."

The President in his proclamation leaves no room for doubt as to the intent with which the railroads were all taken under Federal control, nor does the President leave any room for doubt as to the purpose of the Government to pay a definite measure of compensation for the use of the properties.

In a statement issued simultaneous with the proclamation the President said:

> "I have exercised the powers over the transportation systems of the country * * * because it has become imperatively necessary for me to do so. This is a war of resources

no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and the simplified method of coordination which have not proved possible under private management and control."

In this statement the President furthermore recognizes the fact that the managements of the carriers would be put at a disadvantage and that the earning power would be affected. Amongst other things he said:

"Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings and the committee (meaning a railway committee cooperating with the Government) was, of course, without power or authority to re-arrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends."

The language used in the statement is incompatible with any other theory than that the Presi-

dent intended to draft all of the railroad properties of the United States engaged in general transportation into Government service just as all citizens of military age were drafted, leaving question as to fitness or desirability to be determined at a later date. Also that unified operation would necessarily affect the earning power of the carriers.

Before leaving this phase of the case I call attention to the fact that the language used by the President in describing the transportation systems which were taken into Federal control covers and includes in specific terms "each and every system of transportation * * * consisting of railroads and owned or controlled systems of coastwise or inland transportation engaged in general transportation; whether operated by steam or by electric power * * *," but declares that "nothing herein shall be construed as now affecting the possession, operation and control of street electric passenger railways, including railways commonly called interurbans" and in this connection says "by subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or operation may be taken of all or any part of such street railway systems."

It is also worthy of note that in the statement issued by the President along with the proclamation it is declared:

> "Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Govern-

ment as they could be by the Directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30th, 1917; and I am entirely confident that Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment." (Rec. 30.)

This brings me to a brief discussion of the effect of subsequent legislation which relates to these acts of the President.

The Federal Control Act.

On March 18, 1918, Congress passed "An Act to Provide for the Operation of Transportation Systems While Under Federal Control, for the Just Compensation of Their Owners, and for Other Purposes," commonly called the Federal Control Act.

It is plain to be seen that a part of this Act, particularly Sections 1 to 4, inclusive, is intended to carry out the promise of the President above referred to.

It specifically empowers the President to make guarantees in the identical way he assured would be asked of Congress and is a ratification and confirmation of all the President had done and promised. It declares:

> "That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen."

It also declares in the same section—

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: * * *."

In the court below the Government's counsel devoted considerable time arguing that this provision of Section 1 of the Federal Control Act is of no effect either as evidence that the roads described were taken into Federal control by the Proclamation or as an exercise of legislative power which *ipso facto* brought them into Federal control. Counsel for the Government asserted that it appears from proceedings before the Committees in Congress and is so notorious as to require the court to take judicial notice thereof, that this provision was procured to be inserted in the Federal Control Act by representatives of the so-called Short Line Railroads of which appellant is one, and that it is apparent that this provision was procured to be inserted because it was recognized that the President in his discretion did not take and operate these properties.

While it would seem that the legal and practical effect of the proclamation and the orders and notices of the Director General issued in connection therewith, are conclusive of the question, it may set at rest any possible doubt to see just what did occasion this act of Congress in relation to this class of roads.

It is a matter of history that shortly after the railroads were taken under Federal control, the Director General took the position that these short line railroads were not needful or desirable. This attitude first became publicly known through statements made before the Committee on Interstate and Foreign Commerce of the House of Representatives of Congress in the hearings of bills

introduced in the House and Senate in January, 1918, in aid of the President's Proclamation, which resulted in the passage of what is commonly called "The Federal Control Act" of March 21, 1918.

The proponent of the bill which was pending in the Senate was Hon. Geo. W. Anderson, then a member of the Interstate Commerce Commission, who, together with Hon. John Barton Payne, appeared in behalf of the Director General. Commissioner Anderson while presenting the proposed bill to the Committee of the Senate said:

> "If the President thought it was necessary to take an industrial railroad which runs up to a coal mine—and coal is very much needed for war purposes—and use that as part of the system of transportation, for getting that coal, to supply it to our allies, and did not do it—I think he would be derelict in his duty.
>
> "Senator Underwood of the Committee said: 'That is a good illustration and that is what I am coming to. If under this order he has taken over all of these lines, then practically every industrial railroad is within the jurisdiction of the Director General today.'
>
> "Commissioner Anderson: 'The Proclamation says that he will take control of each and every system of transportation, and the appurtenances thereof located wholly or in part within the boundaries of continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation.'
>
> "That is the limiting phrase * * * 'engaged in general transportation,' etc.

"That is what he took, and then there is an exception that I read a few moments ago, excluding the trolleys and interurbans; and that the extent of the Proclamation may be hereafter narrowed or extended. That is the way it stands now.

"Senator Cummins: 'There is no provision in this bill for compensation to such roads unless they have been taken over by the President.'

"Commissioner Anderson: 'That is true.'

"Senator Underwood: 'Up to this time the only taking over has been the Proclamation by the President. There has not been any technical taking over, but only as the railroads recognize the Proclamation that has been issued. They are taken over if the Proclamation is broad enough, just as well as the British systems are.'

"Commissioner Anderson: 'If they are railroads engaged in general transportation they are taken. If they are not railroads engaged in general transportation they have not been taken.'

"Senator Underwood: 'That is what I wanted to know.' " (See Published Proceedings, Senate Resolution 171, Part III, pages 476 and 477.)

In hearings before the Committee of the House, H. R. 8172, Judge John Barton Payne, who appeared as representative for the Director General in support of the proposed bill, for the first time disclosed the attitude of the Director General as being opposed to retaining many of the short line railroads. I quote certain statements made by Judge Payne in answer to questions of members

of the Committee. While Mr. Bird M. Robinson, President of the American Short Line Railroad Association, was presenting a proposed amendment to the bill, Judge Payne interposed the following:

"Mr. Payne: Mr. Chairman, I wonder whether it would help the Committee, and perhaps it was due to these gentlemen, to make a brief statement about the way these roads are coming in to the director—applications from these roads for a determination whether they are included in the President's proclamation. When I say 'these roads' I haven't any reference to particular roads, which may be here, but the short roads.

"The act of August, 1916, under which the President's proclamation provides for the taking over by the Government of a system or systems, or parts thereof, of transportation, it follows, of course, that unless these short roads constitute a part of a system of transportation necessary to be used by the Government in war times, that they do not come within the purview of the President's proclamation. So that it must not be assumed that all of these roads are included.

"Mr. Esch: Mr. Payne, practically every one of these short lines. If that short line hauls lumber, products of the mine, wouldn't that bring it within the system or parts of systems?

"Mr. Payne: Very likely, and that is what I want to make clear. It does not follow that all these roads are included. Many of them will be included—for instance, roads that operate to munition factories or lumber

camps necessary now for the Fleet Corporation to get—whatever is necessary as a part of any system of transportation for war time needs is taken over, and you must, of course, provide a means for determining what is just compensation.

"Mr. Hamilton: Mr. Payne, is any discretion given to the director under the proclamation in determining whether a road shall be included in a system?

"Mr. Payne: It must be so, because it is a physical fact.

"Mr. Hamilton: For illustration, here is a short line which is a feeder, to some extent. Would the director be permitted to exclude that road operating under a discretion, or would it necessarily have to be included?

"Mr. Payne: It depends entirely on the facts; the proclamation contemplates the roads may be dropped out. You have got to consider; somebody has got to consider. (See Pages 239, 240, Part 2, Hearings on H. R. 8172.)"

Certain Proceedings in the Senate Committee on Interstate Commerce in June, 1918, are submitted as appendix hereto which seem to clearly show that at that time the so-called Short Line Railroads were considered within Federal control.

Argument that this provision of the Federal Control Act is evidence that anybody believed the short line roads were not included in the proclamation or that it was deemed necessary to procure Congressional action to bring them under Federal control, is thus shown to be fallacious. What was manifestly at the bottom of the matter was the

fact that the Director General had the right to relinquish them and was asserting that they were not needed.

Whatever else may be said of this provision it must be read and interpreted in connection with the law under which the President issued his proclamation and when thus viewed it is a limitation upon the power of the President to consider one class of railroads as needful or desirable and leave out the other class mentioned in the Act.

Did Congress Exceed Its Powers in the Transportation Act?

This brings me to another contention of the Government in regard to the provision of the Transportation Act. It was argued below and may be argued here, that our Government is one of divided powers and that the provision under consideration is a direction to coordinate branches of the Government to treat these carriers as if they had been taken, whether they had been so taken or not, or else it is an instruction to treat the facts bearing upon the question of whether these roads had been taken as conclusive that they had in fact been taken. That the taking, if at all, was the act of the President and until he exercised such power and took possession of the road it was not taken.

With all deference to Government's counsel I do not think this is sound in law or logic. In the first place it should be remembered that in the passage of this law the power of the President was coordinated with that of the Congress. He ap-

proved the Act. He did not veto it as he could have done. In the second place, the Act is not a mere declaration or the expression of opinion as to former legislation or the President's proclamation. It is an unequivocal expression of legislative will on a matter strictly within the powers of the legislative department. It declares the class of roads described "shall be held and considered as within Federal control * * * and necessary for the prosecution of the war * * * and entitled to all the benefits of the provisions of this Act."

The theory that Congress could not with the President's approval declare the roads as thus operated to be in Federal control, is to deny to Congress the very power by which they were taken in the first instance. The courts hold that whether property is to be taken or condemned for public use is a legislative question. Shoemaker *vs.* United States, 147 U. S. 282; Monongahela Nav. Co. *vs.* United States, 148 U. S. 312; United States *vs.* Gettysburg E. Ry., 160 U. S. 668.

The Government's contention reduced to its last analysis is that notwithstanding Congress and the President in the exercise of their coordinated functions declared in the form of a legislative act the necessity for public use, and commanded that these roads be held and considered as within Federal control, thus designating those in possession as agents of the Government just as the President did in his proclamation several months before, that such exercise of power is subject to review by the judiciary. What Congress did is not subject to

review. That is a political and legislative matter and not within the jurisdiction of the courts. Chappell *vs.* United States, 160 U. S. 499; Union Bridge Co. *vs.* United States, 204 U. S. 364.

The Government's counsel in the lower court in support of the contention that the provision of law was an attempted usurpation of executive and judicial power, cited the following cases: Marbury *vs.* Madison, 1 Cranch 137; United States *vs.* Claflin, 97 U. S. 546; Koshkonong *vs.* Burlon, 104 U. S. 668; and Monongahela Nav. Co. *vs.* United States, 148 U. S. 312.

These cases seem to have no other application than that they point out and enforce the distinction between legislative and judicial power. They all clearly recognize that where an act is the expression of legislative will or deals with a question of political and legislative character the jurisdiction of Congress is exclusive and supreme. In the Claflin case it is held that "even a declaratory act, or an act directing how a former act shall be construed is inoperative in the past though controlling in the future."

Facts Showing Appellant's Road Was Operated Under Federal Control.

The Government contended and the Court of Claims holds that during the whole period for which Plaintiff claims compensation it had absolute control of its property and operated it exactly as it always had operated it. The lower court makes no mention and seems to take no notice of

the fact that for the first few months of Federal control every road within the terms of the proclamation was operated by the same officers and employees exactly as they had previously operated them, but in this connection quotes the letter of relinquishment from John Barton Payne and says the letter shows on its face that the General Counsel of the Railroad Administration did not believe that the property of the plaintiff was under Federal control and the letter had for its object the removal of any possible question about the matter. It is regrettable that the court did not see fit to discuss other and more important facts upon which appellant does rely, notably the unequivocal language of the proclamation and statement of the President, the Director General's notice of December 28, 1917, addressed "To the Presidents and Directors of All Railroad Companies," and his other orders and notices hereinbefore mentioned; also the finding of the Board of Referees as follows: "We find and report that Federal control of plaintiff's railroad property within the intent of the Federal Control Act was established in law and fact at 12 o'clock noon on December 28, 1917, and continued until June 29, 1918." I shall again refer to report of the Board of Referees. I mention it here merely to show that its finding of fact above quoted and which is by law of prima facie value is not overturned or rebutted by facts in the record. If so, what are such facts?

It is true as stipulated by counsel that the same officers operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior

thereto; that it never received any instructions from the Director General applying to it individually. That it received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained other than those heretofore mentioned and that "the appellant from December 28, 1918, to December 29, 1919, continued to operate its road exactly as it had always operated it." (R. 39-40.)

This admission goes no farther than to say that there was no change whatever in the manner in which the road was operated before and during the first six months of 1918. That the officers received no specific directions from the Director General as to how it should be operated or maintained and that it was operated by the same officials as had theretofore operated it.

As opposed to this admission is the fact that both the President and Director General instructed that the roads be operated as theretofore unless by general or special order it should be otherwise directed; and in addition to the notices and orders of the Director General addressed to the railroad managements generally, but which were sent to and received by appellant as already shown, the following facts should be considered:

(a) Upon receipt of Director General's Order No. 1 the manager of appellant's road wired the Director General and asked if the road was under Federal control and if he should obey the order, and received reply from Director General directing him to obey the order. (R. 36.)

(b) Passage of the [redacted] Act containing provision last above discussed declaring that all such roads as appellant be held and considered as under Federal control and necessary to the prosecution of the war.

It is appropriate in this connection to call attention to the fact that on June 29, 1918, the same date as Judge Payne's letter referred to above, the President issued a public statement that is incompatible with any other theory than that he had assumed control of these so-called short line railroads and was holding and operating them through their former managements. The President in this statement says *inter alia*:

> "Under the Act of March 21, 1918, it becomes necessary for the United States Railroad Administration, prior to July 1, 1918, to exercise the responsibility, created by section 14 of that act, of determining what railroads or parts of railroads it is not needful or desirable shall continue under Federal control.
>
> "So far as it has been practicable, in such a complicated matter, to develop the facts up to the present time, it has become apparent that there are large numbers of the shorter railroads whose Federal control is not needful or desirable.
>
> "The Railroad Administration has therefore provided that all such railroads be relinquished, except in cases where it has already been ascertained that it is needful or desirable that such railroads shall be under Federal control. * * *
>
> "It may be that the creation of Federal control over railroad systems in general will tend

to change unfavorably the situation of many of these smaller railroads, unless special care shall be taken to avoid such unfavorable results, with consequences detrimental both to the local public service and to the just interests of the railroad owners.

"To avoid these consequences and to preserve in every reasonable respect a status for the railroads so relinquished as favorable as that which they enjoyed during the three-year test period (the three years ended June 30th, 1917), great care will be taken to see that the railroads so relinquished are given fair divisions of joint rates, are insured a reasonable car supply—circumstances considered—and are protected against any undue disturbance in the routing of traffic.

"In order to make sure that a continuing study and supervision shall be provided for the carrying out of the policy thus outlined, there will be created at once in the Railroad Administration's Division of Public Service and Accounting a Short Line Railroad Section, the manager of which will be charged with the special duty of ascertaining what is necessary in order to give as to these matters reasonable protection to the railroads relinquished."

(See Bulletin No. 4, U. S. Railroad Administration, Director General of Railroads, Page 117.)

Two things are apparent from this statement:

(1) That the President considered these roads as in Federal control and if not relinquished by July 1, 1918, as provided in Section 14 of the Federal Control Act, could not be relinquished sepa-

rately from the other roads except by agreement.

(2) That the President realized (as stated), that Federal control of the railroads in general might unfavorably change the situation of these smaller roads when relinquished, and to avoid these consequences and to preserve in every reasonable respect a status as favorable as that they enjoyed during the three-year test period (the three years ended June 30, 1917) great care would be given to see that the roads so relinquished are given fair divisions of joint rates, are insured a reasonable car supply and protected against any undue disturbance in the routing of traffic.

It will also be noted that the President declares there will be created at once in the Railroad Administration "a short line railroad section the manager of which will be charged with the special duty of ascertaining what is necessary in order to give as to these matters reasonable protection to the railroads relinquished."

The fact that an astute and zealous lawyer acting for the Railroad Administration should express himself as did Judge Payne in the letter quoted by the lower court, ought not to nullify this very obvious understanding of the President nor overturn the facts clearly deducible from the statement. It is peculiar, if not significant, that this letter was not signed officially. Inasmuch as roads were lawfully relinquished and could not be brought back into Federal control except through a second proclamation of the President acting in conjunction with the Secretary of War, it is conceivable that a far-seeing lawyer might designedly

seek to leave the Government in as easy position as possible.

Compensation.

The lower court holds that the just compensation to be awarded (in this case), is to be measured by the loss caused to the property by the taking, whereas appellant respectfully submits that if the property was taken into Federal control as we contend, then appellant is entitled to the rental value during the time it was in Government use or under Government control.

Be it remembered that there is no dispute of title as between appellant and the Government. The Government recognized appellant's title and appellant recognized the right of the Government to subordinate the property to public use for carrying on the war. Whether or not the taking was an exercise of the power of eminent domain or a contract which established the relation of landlord and tenant is unimportant. In either case if this guaranteed return be not applied the value would have to be determined by the productiveness or earning power ascertained as of the time of the taking. But I think the correct view is to treat the relationship established as one of contract rather than the exercise of the power of eminent domain. A. W. Duckett & Co., Inc., *vs.* United States Advance Case No. 108, decided November 17, 1924.

It should be borne in mind that when the roads were taken the President proclaimed what the

measure of compensation would be. He declared that—

> "Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment."

The President also said—

> "The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful."

Owners of the properties made no objection but in fact assented to the terms proposed by the President, awaiting as they had a right to do preparation of the form of agreement to be entered into as between them and the President. These forms of agreement, as everybody knows, were negotiated as between the Director General, as agent of the President, and the two classes of carriers, namely, Class I or trunk road carriers, and that class of carriers known as short line railroads.

The forms of agreement finally adopted are set forth in Bulletin No. 4 titled "Public Acts—Proclamations by the President Relating to the United States Railroad Administration and General Orders and Circulars Issued by the Director General of Railroads," pages 39 to 84, inclusive. These forms were not adopted until sometime after the first of July, 1918, and in the meantime the short line railroads, generally, had been relinquished from Federal control. If these facts did not establish contractual relations, definitely fixing the compensation agreed to be paid, what is their legal effect?

We believe the President was authorized under existing law when the roads were taken to agree as to the compensation to be paid without further act of Congress, but the Court should bear in mind that Congress in Section I of the Federal Control Act, passed March 21, 1918, authorized the President to agree with and to guarantee to any carrier making operating returns to the Interstate Commerce Commission that during the period of Federal control "it shall receive as just compensation

an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen," and declared the average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President.

Here was definite approval of the declaration of the President as to the compensation which would be paid to the carriers, which related back to the promise of the President when the properties were taken into Federal control, and which constitutes the terms of the obligation upon which the minds of the respective parties met; hence ought, in all good conscience, be utilized and enforced as the measure of compensation in every case where the property of a carrier was taken into Federal control by the President's proclamation.

Plaintiff's claim rests upon the promise of the United States to pay for the use of the property a sum equivalent to the average of the three-year period mentioned in the Proclamation and the law. There is a wide distinction between this case and an ordinary condemnation case where the Government takes permanent possession of property under the right of eminent domain as ordinarily resorted to.

In the case of Bigby *vs.* United States, 188 U. S. 400, the Supreme Court points out the distinction between those cases where lawful authority has

been previously given for the taking of private property for public use under the principles of an implied contract and where such property is taken without previous authority conferred by law. The Court says:

> "Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the Government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in United States *vs.* Russell, 13 Wall. 623, which was an action to recover for the use of certain steamers used in the business of the Government pursuant to an understanding with the owner that he should be compensated; or, in United States *vs.* Great Falls Mfg. Co., 112 U. S. 645, in which it appeared that certain private property was appropriated by officers of the Government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in United States *vs.* Palmer, 128 U. S. 262, which was an action to recover for the use of a patent which the Government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which is used for the Government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the Government would pay for such use."

In the instant case the implied contract went beyond the mere implication to pay for its use but involved such acts and declarations as that the minds of the parties met as to the precise compensation which would be paid.

In the case of Duckett & Company *vs.* United States *supra*, the notice given by the Government was "to whom it may concern" which stated—

> "Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises."

but was not served directly upon the tenant whose leasehold was taken. Nevertheless this honorable Court, by Mr. Justice Holmes, says:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order."

and in another part of the opinion—

> "We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised for compensation seemingly to all."

This case seems to support the contention that the President's promise as to the measure of compensation assented to by the carriers did not necessarily require the approval Congress gave in the

Federal Control Act and that there is no ground for attributing to the Government the extraordinary intent to pay the stronger railroads the guaranteed amount based upon the three-year test period and exclude the weak lines.

Measure of Compensation.

We earnestly insist that the amount of compensation to which plaintiff is entitled has been established by the report of the Board of Referees and the legal effect of this report cannot be overcome unless it appears from the record that it is without evidence to sustain it or that there are facts in the record which overcome the prima facie effect of the Board's action. The Court of Claims concedes that the Referees' findings are prima facie but seems to question the legal effect on the ground that the Board applied an erroneous measure of compensation. As to this it says in the beginning of its opinion (R. 42):

> "The finding of the amount of the award for just compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the Government of plaintiff's property for public use."

I have tried to point out that the Court is in error in holding that there was no taking by the

Government, hence I now address myself to the question as to whether or not the prima facie effect of the Referees' award is overcome upon the grounds stated that the Board applied an erroneous measure of compensation.

What measure of compensation did the Board apply? In its findings the Board declares that compensation for use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the Government, and agreement to pay the fair rental therefor. (R. 12.) That evidence of earning power offers the best measure and that it appears furthermore that the rental value must be taken as of the commencement of Federal control citing authorities. (R. 13.) The Board then says:

> "Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions and in addition such as might be foreseen by reasonably intelligent business men can be given any weight in our conclusions. This is based on justice and sound reasoning, *because the lessor of a business would have no standing in court to urge a reduction in rental if the results of his own management showed a declining income, and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone.* Accordingly our judgment of the rental value of the lease in this case must be based largely upon the evidence before us of plaintiff's earning power

prior to December 28, 1917. It is quite true, as respondent's attorney points out, that this Board is in no way bound by the standard return as a measure of just compensation. Nevertheless, it is worthy of our most earnest consideration that past earning power as evidenced by an average for a period of years was adopted as a basis of value in the Federal Control Act after long investigation and was the agreed measure in the standard contract entered into by the Railroad Administration and most of the carriers after many months of conference. However, such evidence of past earning power must be considered, together with any evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect the future revenues and expenses of a railroad."

The Court of Claims in its opinion does not directly decide that this measure of compensation is erroneous but after asserting that the question of compensation is a judicial one and that the Court is not bound to adopt the method of ascertaining it which may be suggested by the statute, then proceeds to say:

"The just compensation to be awarded is to be measured by the loss caused to the property by the taking. The plaintiff in this case is entitled to receive the value of what it has been deprived, and no more. 'To award it less would be unjust to it, to award it more would be unjust to the public.' Bauman *vs.* Ross, 167 U. S. 548, 574. The question is what has the plaintiff lost? If it has lost nothing it would be gross injustice to require the United

States to pay something for nothing. What has the plaintiff lost by the supposed taking? There is no proof that it has lost anything thereby." (R. 44.)

* * * * * * *

"All the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which were taken possession of by the Government and actually operated and controlled by it. Surely Congress never intended that the United States should pay for the losses or depreciation of properties which the Government did not operate, did not control, did not use, and did not take possession of." (R. 44-45.)

How Congress felt about this matter seems clearly indicated by the language of Paragraph 7 of Section I of the Federal Control Act and Section 204 of the Transportation Act of 1920 hereinbefore referred to.

Section 204 of the Transportation Act of 1920 is titled "Reimbursement of Deficits During Federal Control" and is plainly intended to do just what the Court of Claims seems to think Congress would not do, namely, reimburse the owners of such property as the one under consideration in the instant case for losses incurred while operated, not by the Government, but by their owners. It declares among other things:

"The term 'carrier' means a carrier by rail-

road which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation * * *."

(Note this is same language as used in Paragraph 7 of Section I of Federal Control Act describing the so-called short line railroads.)

However, it is obvious from a reading of the opinion of the Court of Claims that in proceeding to the conclusion that the Board of Referees applied an erroneous measure of compensation, such conclusion is, as necessarily it must be, based upon the proposition that there was no taking by the Government. We have discussed that question and readily concede that plaintiff's claim must fail if its property was not taken in Government control within the meaning of the Constitution and law. On the other hand, if in legal effect plaintiff's property was taken into Federal control, we respectfully insist that the measure of compensation applied by the Board of Referees is not erroneous and there is no evidence in this record to overcome the prima facie effect of the Referees' report.

As basis for its finding as to just compensation, as we have heretofore pointed out, the Board of Referees considered that there was and is an implied obligation on the part of the Government to pay for the temporary use of the property, com-

pensation equivalent to the rental value of the property, or, stated in another way, compensation based upon the productive value of the property to its owner at the time of the taking. I submit this is sound law.

In the case of Carpenter *vs.* United States, 17 Wall. 493, the Supreme Court *inter alia* says:

> "However, it has sometimes been said an action of debt or assumpsit for the use and occupation of land can be maintained only when the relation of landlord and tenant has existed. This is not strictly accurate if it be meant that a demise must be in fact proved. * * * Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of plaintiff without an express contract the law implies a promise * * * to make compensation or to pay a reasonable rent for his occupation. In such a case the consent of the owner to defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise or doubtless prima facie evidence of a demise. This is because a demise with a corresponding agreement to pay rent, or make compensation for the use of property, is consistent with an unexplained entry by the owners consent and because it is a reasonable presumption that occupation thus taken was intended to be paid for."

In the case of Pope *vs.* United States, 26 Ct. of Clms. 11, it is stated in the head note:

"The court adheres to the rule in Johnson's case, 2 Ct. of Clms. 291, that the rule for the measure of damages for the temporary occupation of land by the Government is the *value of the occupancy at the time of entry.* (Our italics.) The relations of landlord and tenant become fixed at the time of the entry; and when holding continues and becomes tenancy from year to year, neither party can be made subject to the fluctuations of real estate in the market. Rent once fixed continues until changed by agreement."

It would seem to be a matter of supererogation to argue that just compensation for the use of property temporarily taken from its owner could be measured by its productive use at a subsequent date. Suppose the property had earned more than the standard return while under Federal control. Could the owner claim that as a measure of just compensation? This question has been considered in an able opinion by the Board of Referees in a more recent case, viz: Docket No. 122, Wyandotte Terminal R. R. Co. *vs.* Director General, which case with others now being prosecuted against the Director General may come before this honorable Court for determination. The argument of the Board seems so strongly supported by authority and so sound in logic as that I quote therefrom at some length as a fitting conclusion to this brief:

"Even though we accept as correct the government's position taken in its motion to dismiss to the effect, in substance, that plaintiff must have shown that the earnings of the rail-

road during federal control and admittedly retained by plaintiff were less than what they would have been if plaintiff had been left in full control of its property and that that loss was directly attributable to some act or acts of the Director General, there would still be just grounds for denying the motion. It is well known that the railroads, in common with other industry, were experiencing sharp and progressive rises in operating costs at the commencement of Federal control. Such conditions warranted commensurate increases in the rates of a public service corporation that could have been assumed without hardship by the majority of shippers during the then generally prevailing high price conditions. It cannot be said with certainty that plaintiff would have instituted such rate increases but it may be said that its authority to do so was taken from it and the undivided power to fix rates was conferred upon the Government. The record shows a loss or decline in net earnings for the period of Federal control as compared with average net earnings for preceding years. Under these circumstances it must be considered that some part of the loss or decline in earning power was directly attributable to the Director General's failure to fix rates which would keep pace with the rising costs of operation. .Giving full recogition to the fact that governmental management was properly directed toward the achievement of results in the successful prosecution of the war rather than the successful management of any particular railroad it must be still conceded that the loss resulting from the public use of this railroad was a loss for which compensation should be paid under the constitution.

"The determination of the just compensation to be paid for private property taken for public purposes is unquestionably a judicial question and the average annual railway operating income for the three years ended June 30, 1917, fixed by the Federal Control Act as maximum compensation for any voluntary agreements made between the President and the railroads is not binding upon this board. That average annual railway operating income is an element that may be considered by the board only in so far as it may be considered representative of the value of the use of plaintiff's property at the time of the taking and under the circumstances and conditions then existing. It is settled by the decision of the United States Supreme Court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States*, 262, U. S. 337, 340; *United States* v. *New River Collieries*, 262 U. S. 341, 344; *Seaboard Air Line Ry.* v. *United States*, 261, U. S. 299, 306; *United States* v. *Benedict*, 261 U. S. 294, 298; *United States* v. *North American Co.*, 253 U. S. 330; *Bauman* v. *Ross*, 167 U. S. 548; *Monongahela Navigation Co.*, v. *United States*, 148 U. S. 312, 341; *United States v. Gill*, 87 U. S. 517. The plaintiff has not attempted to show the amount of loss resulting from separate and specific acts of the Director General but the record contains facts and figures tending to show the value of the use of plaintiff's railroad at the time it was taken. There was no known market value for the use of plaintiff's property at the time it was taken but the decision in the case of *Brooks-Scanlon Corporation* v. *the United States*,

supra, lays down the rules which it was considered should govern in an analogous situation. In that case, it will be remembered, there was involved the question of the value of certain contract rights for the building of a ship that was partially completed when requisitioned by the Government. After stating the basis upon which the claimant asserted that compensation should be determined the court said, at page 8:

'We think it not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimants rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy.'

"It is clear from the above that the board in determining the value of the right to the use of plaintiff's property taken by the Government may not avail itself of all the facts now known that have developed since the taking, affecting favorably or unfavorably, the latter value of that use in the hands of the government but must place itself, as nearly as may be, in the position of the parties at the time of taking with the then known facts before it, including such facts and circumstances that might reasonably be foreseen would result from the then existing conditions. That this is the correct method to be followed is emphasized in a later statement by the court. At page 10 it is said:

'Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and *the then probable value at the time fixed for delivery*, the contract price, the payments made and to be made, the time to elapse before completion and delivery, *the possibility that by reason of the Government's action in costs of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance*, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking.'

"The portions of the above underscored (italicised) by us refer to elements then known or exactly determinable but which the court directs shall be considered as of the time of taking and viewed *in futuro*."

Respectfully submitted,

MARION & RYE VALLEY
RAILWAY COMPANY,
Appellant.

By BEN B. CAIN,
Attorney of Record.

"Mr. Cain: Mr. Chairman, I desire briefly to discuss this subject for the purpose of showing that what is known as the Cummins Amendment of the original Act, which has been read, was placed there for the purpose of clearly defining the announcement which is made in that amendment that the short line railroads are necessary to win the war and were included; in other words, it is an announcement contrary to the statement of the purposes of the administration made by the representatives of the administration before these committees.

"Now, the construction of the law is different. The Railroad Administration takes the position that because the proviso in Section 14 was retained in the Act that they have the right under the law to relinquish a short line, although the trunk line with which it connects may be retained under the Federal control.

"Senator Cummins: The effect of that is to absolutely nullify the amendment which was added to the bill in the Senate, as follows:

'That every railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein

defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act.'

"Mr. Cain: It seems to make the law a mockery because you grant to the short line railroads relief with one hand in the Cummins Amendment, and if the construction of the Railroad Administration is correct, you take it away with the other.

"Senator Kellogg: I had supposed that the provision at the top of page 3 meant that if a trunk line was taken over, the competitive short line must be taken over, and that the proviso in Section 14 meant that the President might release any railroad consistent with the previous provision.

"Senator Cummins: That is what it does mean, I think.

"Senator Kellogg: I do not think I voted for the Cummins Amendment; I do not remember whether I did or not; but that was the construction, I think there is no question, as I understood it.

"Senator Cummins: And that is not only, in my opinion, the spirit of the law, but it is the letter of the law as well. Now, we understand that part of it.

"Mr. Cain: Yes.

"Senator Cummins: And I think what the committee would like to hear is any additional reason that you may have for making that clearer and making it obligatory to retain the short lines if the trunk lines are retained.

"Senator Poindexter: I should like to hear, in that connection, what the Railroad Administration proposes to do, what its attitude is.

"Senator Kellogg: I was just going to ask what their construction was."

* * * * *

"Senator Watson: Would it interrupt you if I asked you a question?

"Mr. Cain: Certainly not.

"Senator Watson: What do they propose to do?

"Mr. Cain: They said—

"Senator Cummins: Will you allow me to interrupt you there for just a moment? I have read the testimony of Judge Payne before the House committee, and I assume that he states fully and accurately the position of the Director General on the subject. For the information of the committee I will try to state in a very few sentences Judge Payne's position, as taken before the House committee. He holds, first, that the Director General has the right to dismiss or relinquish any short line without regard to the trunk line connection; that is to say, he can hold the trunk line and dismiss the short line.

"Senator Watson: What does he say about this provision of the law?

"Senator Cummins: He does not say anything about that in the committee hearings. That is his holding. Secondly, he wants to retain some of the short lines probably and dismiss some of the short lines and asserts, and it is probably true, that there is not time enough between now and the

first of July to determine which of the lines he wants to retain and which of the lines he wants to relinquish. Thirdly, that as to these short lines which he desires to retain, or may desire to retain, that if the first of July comes and he has not made up his mind about it, that then he will lose a powerful influence in making his contracts with the short lines as to compensation inasmuch as he will have lost his right to relinquish them without their consent. In other words, he wants to hold over the short line the power of either retaining them or dismissing them in order to compel them to do what he calls justice to the Government with respect to the terms of retention or compensation. That is his position in the matter. I think I have fairly accurately stated it.

"Senator Watson: Did he give the committee a list of the short lines that have been taken over?

"Senator Cummins: He did not, although he said they had some short lines that had been retained. In fact, he rather considered all the short lines under Federal control, probably, under the act, and with the power left in him to dismiss them at any time before the first of July, which, of course, completely nullifies the act."

* * * * *

"Senator Myers: It is going to be the ruination of these roads if we allow the law to stand as it is. I do not see the good of adopting these resolutions. It simply gives the Government six months longer to work their ruination. It seems to me the thing to do would be to change the law.

"The Chairman: The understanding was, before this resolution was introduced, Judge Payne was before a number of the Senators, and this tentative agreement, by the short line roads, was read to him, and he indicated his willingness to accept that as a basis of taking them over, but indicated that it would be necessary to have more time in which to formulate certain contracts with these roads. He said that there would be certain modifications necessary. I recognize, as all the rest here do, that if there is to be worked a hardship and a disaster to these roads, why, the longer you put it off the worse it will be, because the law says that he must do whatever he is going to do—that is, the administration must do whatever it is going to do by the first of July, so that all roads not definitely relinquished at that time will be, *ipso facto*, under Government control, but in case the Director General absolutely relinquishes all, they would all be out from under Government control, and he could then, by their consent and his agreement, take them back. Is that not so?

"Mr. Cain: That is a mooted question.

"The Chairman: I know it is a mooted question.

"Mr. Cain: And Judge Payne was unwilling to say that they could be taken back.

"Senator Cummins: Is not the chief subject of inquiry here whether we shall make it impossible for him to relinquish all? That is the chief thing and, I think, the only thing.

"Senator Myers: This resolution would not do it.

"Senator Cummins: No; this resolution would

not do it; but I have an amendment which I propose to offer to this resolution that I think will do it. At some time or other I intend to offer this resolution when we reach that stage in the proceedings, and I may as well read it now to add to the resolution before us (reading):

'Providing, however, that the right conferred upon the President to relinquish, prior to July 1, 1918, control of all or any part of any railroad or system of transportation without the consent of the carrier, provided in Section 14 of said act, which right is here extended to July 1, 1919, shall not be construed to include any railroad not owned, controlled or operated by another carrier company, and which has heretofore competed for traffic with the railroad or railroads of which the President has taken or retains the possession, use or control, or which connects with such railroad or is engaged as a common carrier in transportation.'

"The Chairman: That is to make it obligatory?

"Senator Cummins: That is the formal amendment.

'All such railroads as defined in said act approved March 1, 1918, as necessary for the prosecution of the war shall be entitled to the benefit of all the provisions of said act, it being the intent of Congress that every railroad not owned, controlled or operated by another carrier company and which has heretofore competed for traffic with a railroad or railroads of which the President has

taken or retains possession, use and control or which connects with such railroad and is engaged as a common carrier in general transportation shall be held and considered as within Federal control as defined in said act and be held to be necessary for the prosecution of the war and to be entitled to the benefits of all provisions of said act so long as any railroad with which it has heretofore competed for traffic or with which it connects shall remain under Federal control.'

"Then I change slightly the exception, which was in the first act:

'Provided further, that nothing in this resolution or in the said act of March 1, 1918, shall be construed as requiring the President either to take or retain the possession, use or control of any street railway, whether the same be owned, controlled or operated by another carrier company or not, nor to require the President to take or retain the possession, use or control of any interurban or other similar railroad which does not receive at least 25 per cent of its operating revenue from the transportation of freight and which prior to December 29, 1917, did not have through routes with joint rates with one or more steam road carriers.' (See Proceedings of Hearing held June 24, 1918, before the Committee on Interstate Commerce of the United States Senate, Sixty-fifth Congress, Second Session, on S. J. R. 159, beginning at page 4.)

Office Supreme Court, U. S.
FILED
DEC 14 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 315

MARION & RYE VALLEY RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

BRIEF AND ARGUMENT OF VICTOR A. REMY AS AMICUS CURIAE.

VICTOR A. REMY,
Amicus Curiae.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

	PAGES
SCOPE OF THE BRIEF	1
STATEMENT OF FACTS	2-5
The Proclamation of the President of December 26, 1917, and the announcements of the Director General	2
Appellant is a common carrier by railroad engaged in general transportation	2
Communications between the manager of appellant's road and the Railroad Administration	2, 3
Release of appellant's road from federal control and methods of operation while under such control	3, 4
Appellant's claim under Section 204 of the Transportation Act and the ruling of the Interstate Commerce Commission thereon	4
History of the proceedings taken by appellant under the Federal Control Act	4, 5
The grounds upon which the decision of the Court of Claims was based	5
SUMMARY OF ARGUMENT	6-8
The Marion & Rye Valley was under federal operation	6
The decision of the Interstate Commerce Commission in the proceedings brought under Section 204 of the Transportation Act estops the Government from contending to the contrary	7
If appellant was under federal control it is entitled to just compensation	8

PAGES

ARGUMENT 9-27

I. Appellant's road under federal control... 9-15

Appellant's road aptly described in President's Proclamation..... 9

Proclamation in accordance with Congressional authority..... 9

Under the decisions of this Court road was was federally operated..... 10-12

There need be no force employed to constitute a taking 12, 13

Question is not one of intention or of degree 13, 14

Government's contention was counter to its practice in other cases..... 14, 15

II. Government estopped by decision of Interstate Commerce Commission..... 16-19

Question involved in the proceeding before the Commission and its decision..... 16

Parties the same there as here..... 17

Rule of *res adjudicata* applies to decisions of the Commission..... 18

The Commission was exercising judicial functions 18, 19

III. Appellant entitled to just compensation.... 20-27

Findings of Court of Claims..... 20, 21

Court of Claims confused question of damages with that of compensation for use.. 21, 22

The true measure of compensation..... 23, 24

Board of Referees followed the correct measure and its award was made prima facie evidence..... 24, 25

Section 1 of the Federal Control Act affords an analogy supporting the award..... 25-27

Appendix.

	PAGES
Sections 1 and 3 of the Federal Control Act.....	1-5
Section 204 of the Transportation Act.....	5-7
Unreported opinion of the Court of Appeals for the District of Columbia in Abilene & Southern Railway v. United States.....	8-10

AUTHORITIES CITED.

PAGES

Abilene & Southern Railway v. Interstate Commerce Commission (as yet unreported but copy reproduced in appendix) 1, 18, 19
Appendix, p. 8

Bates v. Bodie, 245 U. S. 520, 526 17
Brooks-Scanlon Corporation v. United States, 265 U. S. 106 23

Congressional Debates (Cong. Rec. 56, pt. 2, p. 1944; pt. 3, pp. 2495 and 2435) 12, 26

Davis v. Dantzler, 261 U. S. 280 12
Dennison v. Payne, 293 Fed. 333 18
DuPont de Nemours Co. v. Davis, 264 U. S. 456 21

In re Deficit Settlement with the Marion & Rye Valley Railway Company, 76 I. C. C. Rep. 287 ... 16

Krichman v. United States, 256 U. S. 363 12

North Carolina Railroad v. Lee, 260 U. S. 16 ..... 15, 21

People v. Matthies, 179 N. Y. 242 18
Proclamation of the President of December 26, 1917 ..... 2, 6, 9, 11
Proclamation of the President of July 22, 1918 .... 10, 11

Riverside Oil Co. v. Hitchcock, 190 U. S. 316 19

Southern Pacific v. United States, 168 U. S. 1 17

United States v. Babcock, 250 U. S. 328 19
United States v. Fisher, 223 U. S. 683 19

Western Union Telegraph Co. v. Poston, 256 U. S. 662 ..... 10-12, 21

STATUTES.

PAGES

Act of August 29, 1916 (39 Stat. 645)..... 6, 9

Federal Control Act (40 Stat. 451).....1, 4, 14, 24, 25, 26

Appendix, pp. 1-5

Section 204 of Transportation Act (41 Stat. 460)..

.....1, 4, 16, 19

Appendix, pp. 5-7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 315.

MARION & RYE VALLEY RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES.
Appellee.

BRIEF AND ARGUMENT OF VICTOR A. REMY AS AMICUS CURIAE.

The Court of Claims held that appellant cannot recover under the Federal Control Act (40 Stats. 451) because:

(a) Its railroad was not under federal control from January 1, 1918, to June 30, 1918, the period for which compensation is claimed, and

(b) If appellant's railroad was under federal control, appellant was not damaged thereby.

The facts and the arguments herein will be addressed to these questions. For the Court's convenience we have printed in our appendix hereto the pertinent portions of the Federal Control Act (Sections 1 and 3 thereof), Section 204 of the Transportation Act (41 Stat. 460), and the, as yet unreported, opinion of the Court of Appeals of the District of Columbia in *Abilene and Southern Railway* v. *Interstate Commerce Commission* (decided November 2, 1925). All of these have a bearing upon this case.

STATEMENT OF FACTS.

The case was tried on a stipulation of facts which the Court of Claims adopted as its findings of fact. We wish to supplement the statement in appellant's brief as follows:

1. On December 26, 1917, the President issued a Proclamation purporting to "take possession and assume control" of every system of transportation in the United States

> "consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation,"

and to appoint a Director General of Railroads. (Rec., 26-29.)

2. On December 29, 1917, the Director General issued an order stating that he had "taken possession and assumed control" of the railroads described in the President's Proclamation. (Rec., 31, 32.)

3. In a circular dated January 8, 1918, the Director General said that every railroad officer and employee "is now, in effect, in the service of the United States." (Rec., 33.)

4. Appellant, a Virginia corporation, a common carrier of freight and passengers, operated a railroad from Marion to Sugar Grove, Virginia, which connected with the Norfolk and Western. (Rec., 1, 35.) It received the General Orders of the Director General shown by the record. (31-35.)

5. Buchanan, manager of appellant's railroad, testified that, upon receipt of General Order 1, he wired the Director General inquiring if appellant's road was under federal control and received a reply from the Director General to obey the order. (Rec., 36.)

6. When General Order 28 of the Director General was issued, an application of appellant for a rate increase was pending before the Virginia Commission. This Commission refused to take jurisdiction, so the question was presented to officers of the Railroad Administration and the Interstate Commerce Commission. Acting under their authority, the increases named in General Order No. 28 of the Director General were but in effect. (Rec., 36.)

7. General Order 27, relating to wage increases of employees on certain railroads operated by the Government, did not name appellant but named roads on which said order was to be put into effect. This order was not applied on appellant's road. (Rec., 37.)

8. On July 3 or 4, 1918, appellant received a letter dated June 24, signed by John Barton Payne, general counsel for the Director General, which said:

> "It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same." (Rec., 37.)

9. The books, recording the operations of appellant's road, were kept as directed by General Order 2 issued on December 29, 1917. Appellant did not keep separate books during the period of alleged federal control. (Rec., 38.)

10. From December 28, 1917, to July 1, 1918, there was no change in the manner or method of conducting the operation of appellant's railroad; no earnings received were turned over to the United States; the same character of traffic was carried as theretofore; the road served no military camps and transported no munitions or troops; the same officials operated the railroad as formerly; they received no orders as to maintenance ex-

penditures and no specific instructions whatever from the Director General. (Rec., 39, 40.)

11. Appellant presented to the Interstate Commerce Commission a claim under Section 204 of the Transportation Act of 1920. (41 Stat. 460; Rec., 37.) This claim included amounts alleged to be due under Section 204 on account of operations from January 1, 1918, to June 30, 1918. Section 204 of the Transportation Act applies only to railroads which were not under federal operation. One of the issues before the Commission, therefore, was whether appellant's railroad was under federal operation from January 1, 1918, to June 30, 1918. On December 11, 1922, about six months before this proceeding was brought in the Court of Claims, the Commission held that, during the period involved in this present case, appellant's road was under federal control, and hence was not entitled for such period to compensation under Section 204. (Rec., 37, 38.)

12. Appellant then proceeded, in accordance with Section 3 of the Federal Control Act (40 Stats. L. 451). This section provides that claims, not adjusted by contract, shall be submitted to a board of referees provided for in said section; that said board shall report to the President the just compensation to which the carrier is entitled; that the President

> "is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated.

Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

13. The board reported (Rec., 5-22), after hearing the evidence introduced on behalf of appellant and the Government, that appellant's railroad was taken under federal control on December 28, 1917, and was relinquished on June 29, 1918 (Rec., 10); that appellant could recover just compensation for this use of its property upon the same basis as though there had been an implied lease and an agreement by the Government to pay a fair rental for such use. (Rec., 12.)

14. The Government having refused to pay the award, appellant filed its present petition in the Court of Claims, which held that appellant could not recover because:

a. The President's Proclamation was a "mere declaration of an intention to take" and did not "of itself constitute a taking of the property." (Rec., 42.)

b. No subsequent Governmental action circumscribed appellant's use of its property. (Rec., 42, 43.)

c. If the Government had control of appellant's railroad, this control was not such as would entitle appellant to compensation because

> "The just compensation to be awarded is to be measured by the loss caused to the property by the taking." (Rec., 44.)

In this brief it will be urged that the above conclusions were contrary to the facts and law.

SUMMARY OF THE ARGUMENT.

I. THE MARION & RYE VALLEY RAILWAY WAS UNDER FEDERAL CONTROL FROM JANUARY 1, 1918, TO JUNE 30, 1918.

(a) The President's Proclamation of December 26, 1917, made pursuant to the provision of the Act of August 29, 1916 (39 Stat. 645), by its terms described appellant's railroad and the Government thus assumed possession and control thereof (see *infra*, pp. 9, 10).

(b) Under the decisions of this Court, the Proclamation was not a mere declaration of an intention to take but an actual taking (see *infra*, pp. 10-12.)

(c) Any contention to the contrary leads to the conclusion, that, to constitute a taking, the owner must be ousted by force or something akin thereto and, hence, such an argument, if carried to its logical end, would result in the absurdity that no railroad was taken under federal control (*infra*, pp. 12-14).

(d) The United States, by making settlements with other railroads for the period here involved, has admitted that the President's Proclamation had the legal result of placing such roads under federal operation. As far as this question is concerned, there is no distinction whatsoever between the roads, with which such settlements were made, and appellant's (*infra*, pp. 14, 15).

II. THE UNITED STATES IS ESTOPPED BY THE ADJUDICATION OF THE INTERSTATE COMMERCE COMMISSION IN ITS SETTLEMENT WITH APPELLANT UNDER SECTION 204 OF THE TRANSPORTATION ACT (41 STAT. 460) FROM ASSERTING THAT APPELLANT'S ROAD WAS NOT UNDER FEDERAL OPERATION.

(a) To pass upon appellant's claim under Section 204, the Interstate Commerce Commission had to decide whether appellant's railroad was under federal operation from January 1, 1918, to June 30, 1918. It specifically held that the railroad was under federal operation during said period (*infra*, p. 16.)

(b) The Interstate Commerce Commission thus adjudicated one of the questions at issue here, contrary to the Government's present contention (*infra*, pp. 16, 17).

(c) The Government, as well as appellant, was a party to the proceeding before the Commission (*infra*, p. 17.)

(d) The rule, estopping a party from relitigating a fact judicially established, applies to decisions of public officers and boards in the exercise of judicial functions (*infra*, pp. 17, 18).

(e) The Commission in deciding that appellant's road was under federal operation was exercising a judicial function (*infra*, pp. 18, 19).

III. IF APPELLANT WAS UNDER FEDERAL OPERATION IT IS ENTITLED TO JUST COMPENSATION.

(a) There are no findings of fact of the Court of Claims which could require a contrary conclusion (*infra*, pp. 20-22).

(b) The net income, which was turned over to appellant, instead of to the United States, affords no criterion of just compensation. What the properties earned after the taking is not the true test of just compensation (*infra*, pp. 22, 23).

(c) The true test is the sum that would probably have resulted from fair negotiations prior to the taking (*infra*, pp. 23, 24).

(d) The fact that appellant, without objection on the part of the Government, retained the net income cannot change the rule for measuring just compensation (*infra*, pp. 23, 24).

(e) The Board of Referees in their award followed the true rule of measurement and, this being so, the question of just compensation was one of fact only (*infra*, p. 24).

(f) The report of the Referees was prima facie evidence as to the amount just compensation and there was no evidence before, or finding by, the Court of Claims showing that this amount was erroneous (*infra*, pp. 24, 25).

(h) Congress, when it enacted the Federal Control Act, endeavored to prescribe a method of arriving at a sum which would afford just compensation; and it provided that such compensation should be based upon past earnings. This analogy supports the award of the Board of Referees and is contrary to the holding of the Court of Claims (*infra*, pp. 25-27).

ARGUMENT.

I.

ACCORDING TO THE DECISIONS OF THIS COURT, THE MARION & RYE VALLEY'S RAILROAD WAS TAKEN UNDER FEDERAL CONTROL.

It cannot be fairly claimed, certainly the Court of Claims did not so hold, that appellant was not included in the Proclamation of the President, for that proclamation embraced

> "each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation."

Appellant's railroad is located wholly within the United States. The Court of Claims found that appellant

> "was engaged in business as a common carrier of freight and passengers for hire, operating a line of railroad * * *." (Rec., 36, 1.)

This is descriptive of a railroad engaged in general transportation and there is no finding *contra*. So we may assume that the question, as to whether appellant was engaged in general transportation, is not in issue here.†

† We also assume it will not be seriously claimed that the President had no power to incide in his Proclamation appellant's railroad. While counsel for the Railroad Administration stated before a Congressional Committee that no short line could be taken under federal control, if unnecessary for war uses (see Appellant's brief, p. 27), the Act of August 29, 1916 (39 Stat. 645) contains no such limitation. It provides that the President may take possession

"of any system or systems of transportation, or any part thereof," and may utilize them to the exclusion of all other traffic for any needful or desirable purpose connected with the emergency. Manifestly, under this act, the President could assume control of any railroad, the only limitation being that the road should not be utilized "to the exclusion * * * of all other traffic thereon," except "for purposes connected with the emergency."

Apparently, the chief reason for the holding below was the court's conclusion that the proclamation was a declaration of an intention to take and not a taking.* But this runs directly counter to this Court's holdings. In addition to the cases cited in appellant's brief, the Court's attention is invited to the following authorities:

Western Union Telegraph Co. v. *Poston* (256 U. S. 662, 666) arose on certiorari to review a state Supreme Court's judgment, rendered against the Telegraph Company, because it failed promptly to deliver a telegram sent on October 2, 1918. The defense was that the Telegraph Company's properties had been taken under federal control by the President's Proclamation of July 22, 1918, and hence the Company was not operating the business on October 2, 1918. This Court, in holding that the Telegraph Company was not liable because it was not operating the properties, said that by the Proclamation of July 22nd,

> "the President took possession of and operated the telegraph systems * * *. The companies were not made the operating agents of the United States. The officers of the companies were to operate the properties for the United States and it was to be done 'in the names of their respective companies.' "

---

* We presume this conclusion was based upon the following:

(a) Though the proclamation was issued on December 26, 1917, it states that control and possession is assumed December 28, 1917, and that "such possession," etc., "hereby by me undertaken shall be exercised by and through William G. McAdoo."

(b) The presumption in which the Court of Claims indulged that

"If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of property." (43)

If it be conceded, contrary to what this Court has held, that the foregoing is correct, yet it would seem that such a concession could not be controlling on the outcome of this appeal, for these reasons: On December 28 and again on December 29, 1917, the Director General announced that he had possession of the roads described in the President's proclamation. (Rec., 31, 32.) These were no mere declarations of intention but admissions of a controlling fact—namely, that possession and control had been assumed by the Government. The act of the Director General was the act of the United States, to the same extent as an act of the President.

How controlling that decision is here, can be demonstrated by comparing the pertinent portions of the Proclamation of December 26, 1917 (relating to railroads) with those of July 22, 1918 (relating to telegraphs and telephones) as follows:

THE PROCLAMATION OF DECEMBER 26, 1917. (REC., 28, 29.)

"I, * * * do hereby * * * take possession, and assume control at twelve o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads * * *

Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies. * * *

From and after twelve o'clock on the said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. * * *"

THE PROCLAMATION OF JULY 22, 1918. (SEE 256 U. S., pp. 664. 665.)

"I, * * * do hereby take possession and assume control * * * of each and every telegraph and telephone system and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies. * * *

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies * * *.

From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice. * * *"

If, as held in *Western Union Telegraph Co.* v. *Poston*, the Proclamation of July 22nd, constituted a taking of the telegraph and telephone systems and made the United States the operator thereof, then the Proclamation of December 26, 1917, constituted a taking of the railroads and made the United States the operator of them. And the fact that such operation was to be conducted by the former officers of the companies did not, as was ex-

pressly held in the *Poston* case, make the legal situation differ from that which would have resulted if the United States employed an entirely new set of officers and employees.*

This has been conceded by the Government in other cases. Thus, in *Davis* v. *Dantzler* (261 U. S. 280, 284), the Director General, who represented the United States as fully there as the Department of Justice represents it in the present case, in the answer averred:

> "that on December 26, 1917, the President by proclamation issued in pursuance of law, took possession of the railroad transportation systems of the United States."**

In *Krichman* v. *United States* (256 U. S. 363), the court said (p. 365):

> "The statutes and executive orders concerning railroads are stated in *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135. By the statute of August 29, 1916, § 1, c. 418, 39 Stat. 645, the President was given power to take possession and assume control of the transportation systems of the country. After the declarations of war with Germany (April 6, 1917) and Austria (December 7, 1917), the President issued a proclamation of December 26, 1917, *taking possession of the transportation systems within the boundaries of the United States.*"

Any argument that the Proclamation was not a taking, not only runs counter to the foregoing decisions, but

---

* Indeed, the debates in Congress clearly show that there was never any intention to operate the railroads except through their former officers and employees. Senator Nelson summed up the situation (Cong. Rec., 56, Part 3, p. 2495) in these words:

> "The President will operate these railroads through the officials and employees and operating forces of the different railroads. Manifestly we do not intend that he shall create an operating force of his own. He will give directions to these roads to operate in such and such a manner."

** This is manifestly wholly inconsistent with the contention now made that the Proclamation of December 26 was a mere declaration of an intention. It may perhaps be pertinent to inquire whether the Government may, with good grace, on a fundamental question like this, shift its position to escape liability in accordance with the exigencies of each particular case.

leads to the conclusion that, to constitute a taking, there must be physical action, which deprives the owner of his property by force, or by something akin thereto. For if the Proclamation did not deprive the owners of the use of their railroads, no announcement, whether by proclamation, or by heralds, could do so. There can be no midway station between a proclamation, purporting to assume control and possession of the roads, and a taking of possession through the exclusion of the owners by duress—which would have been as unnecessary as it was impractical. Since in no instance was force employed, or anything akin thereto, the Government's contention and the conclusion of the Court of Claims prove too much for, if true, no railroad was ever under federal control.

While, we believe, that the foregoing is a fair criticism of the Government's position, the Government may here claim that the question must be determined by the intention of the parties as disclosed by their later acts. A sufficient answer to this contention is, that, since it is undisputed that the President's Proclamation was issued, the sole question is as to its legal effect, and what was later done could not alter the legal status established by that Proclamation. Therefore, whether the Director General, or the railroad's management, thought that appellant's road was under federal control, would appear to be merely a matter of legal conjecture. But, however this may be, it is clear that both parties deemed the road under federal control immediately after the Proclamation was issued, for orders were sent to the railroad, and its management was specifically directed to obey these orders. (Rec., 36.) There was not a scintilla of evidence that this was done through inadvertence. To argue that some roads were under federal control because they received a large number of orders from the Director General, which changed the

methods of their prior operation, and that other roads were not under federal control, because they received few orders and these did not change their operating methods, is unsound. It is like saying that, whether a man was a soldier, would depend, not upon whether he was inducted into the army, but upon the number and kinds of orders he received thereafter. Had the appellant's road not been under federal control, no order of the Director General could bind it, and the Director General would have no authority to issue any order to it.

Moreover, it is a matter of common knowledge, that, in the most instances, the Government has settled with the owners of the railroads, and that such settlements covered the period from January 1, 1918, to June 30, 1918. It is true that usually these settlements were made in accordance with contracts, between the Director General and the owners of the railroads, entered into pursuant to the Federal Control Act, which was enacted March 21, 1918. But whether a contract was made with a railroad company affords no test as to whether the railroad was under federal control, as Section 3 of the Federal Control Act itself recognizes. Nor could the Director General contract to pay just compensation to a road for a period during which it was not under federal control. So that these roads, with which settlements were made, must have been taken under federal control at some particular time prior to January 1, 1918, and by some specific act. There is no possible distinction between the act which brought the roads, with which such settlements have been made, under federal control, and the act which brought appellant's road under federal control. The President's Proclamation, the letter of the Director General of December 28, 1917 (Rec., 31) and Orders Nos. 1 and 2 of the Director General, dated December 29, 1917, were the only govern-

mental acts relating to the subject which occurred prior to January 1, 1918. (Rec., 31, 32.) The next communications were issued January 5, 1918 (see Bulletin 4 of the Railroad Administration, pp. 99, 146), and these have nothing to do with the assumption of control. The sole distinction, between the treatment accorded to roads like appellant's and the roads with whom settlements have been made, is that the latter received certain orders, issued some weeks after the Proclamation, which appellant's road did not receive.* But if any weight is to be attached to this fact, it must be argued that it was by virtue of these subsequent orders that federal control was assumed. The Government's own actions refute such an argument, since it settled with these roads, not from the date of such subsequent orders, but from the date fixed by the Proclamation.

The contention that appellant was not taken under federal control, therefore, is contrary to the decisions of this Court; it leads to absurd and illogical consequences; it is opposed to the practice of the Government in other cases.

---

* Some stress seems to have been laid upon the fact that appellant's road was not mentioned in Order No. 27, issued May 25, 1918, which related to wage increases. (Rec., 37.) But, aside from what has previously been said, it is manifest that this has no bearing upon the question at issue. General Order 27 did not name, or purport to name, all the roads under federal control. By a supplemental order, dated July 3, 1918 (after appellant's road had been released from federal control) several hundred carriers were named to whom the order was made applicable, that were not named in the original order of May 25th (United States Railroad Administration Bulletin No. 4, pp. 198-202, 221-226). Further, in *North Carolina Railroad Co.* v. *Lee* (260 U. S. 16, 17) this Court held that the North Carolina Railroad had been taken under federal control. This railroad was not named in either Order No. 27 or in the supplement thereto.

II.

THE GOVERNMENT IS ESTOPPED BY THE ADJUDICATION OF THE INTERSTATE COMMERCE COMMISSION FROM CLAIMING THAT APPELLANT'S ROAD WAS NOT UNDER FEDERAL CONTROL.

While we believe that what has heretofore been said amply demonstrates that appellant's road was taken under federal control, we suggest that this case might be safely rested upon a different principle than any heretofore mentioned.

As heretofore stated (*supra*, p. 4) appellant presented a claim to the Interstate Commerce Commission under Section 204 of the Transportation Act. The claim included a demand for compensation from January 1, 1918, to June 30, 1918—the same period for which compensation is claimed in the instant proceeding. Under the terms of Section 204 the compensation therein provided for, could only be paid to a carrier for such period as "its railroad or systems of transportation was not under federal operation." (See Appendix, pp. 5, 6.) Therefore, whether appellant's road was under federal operation from January 1, 1918, to June 30, 1918, was a necessary issue in the proceeding before the Commission. On December 11, 1922, some six months before the present action was started in the Court of Claims, the Commission decided that appellant's railroad was under federal control and operation from January 1, 1918, to June 30, 1918, and hence was not entitled to the benefits of Section 204 during such period. (Rec., 37.)

> *In re Deficit Settlement with the Marion & Rye Valley Railway Company*, 76 I. C. C. Reports 287.

This decision, according to the rule which prohibits parties from later relitigating a fact that was in issue

and decided by a competent tribunal, estops the Government from contending that appellant's road was not operated by the United States during the period in question.

While the claim before the Interstate Commerce Commission was founded upon the Transportation Act, whereas here it is predicated upon the Federal Control Act, this difference is not controlling upon the question now under consideration, for the test is not whether the proceedings were based upon the same cause of action.

Bates v. *Bodie*, 245 U. S. 520, 526.
Southern Pacific v. *United States*, 168 U. S. 1, 48.

The parties to both proceedings are identical, unless it can be said that the United States was not a party to the one before the Commission. But, we believe that the Commission, itself, represented the United States in that proceeding just as completely as the Land Department does in contests relating to public land. Under Section 204 the Commission was acting as a claim board. In passing upon and auditing the claims of the carriers under Section 204, the Commission necessarily was the representative of the United States. Upon its certificate the Secretary of the Treasury was obligated to pay; he was given no discretion in the matter. Mandamus would lie if he refused. The Commission's decision was thus binding upon the Secretary of Treasury and hence upon the United States. Since no one can be bound by a proceeding to which he is not a party, it follows that the United States was necessarily a party to proceeding before the Commission under Section 204.

It may, however, be urged that, granting all this, the Commission's decision could not, upon any recognized principle of *res adjudicata*, estop the Government here, because the Commission is not a court. But the test is whether the decision involved the performance of a judicial function—not the title of the performer. The rule, forbidding collateral attacks on matters judicially

determined, applies to the judicial and quasi-judicial acts of public officers and boards exactly as it does to the judgments of courts of general jurisdiction.

Dennison v. *Payne,* 293 Fed. 333, 341 (C. C. A., 2nd Cir.),

In *People* v. *Matthies,* 179 N. Y. 242 (72 N. E. 103), it appeared that the Board of Town Auditors of White Plains was authorized by statute to examine and decide claims presented against the town. After the board had rejected a certain claim, a mandamus proceeding was brought. The Court of Appeals said:

> "The determination of the town auditors by which they decided that the claim presented by the relators was not a valid claim against the town and should be rejected was a judicial determination, and is conclusive until reversed or modified in proceedings by certiorari."

After stating that the court could not dictate the judgment of the board, it added that

> "the rule of *res adjudicata* applies to all judicial determinations * * *."

In the instant case, the principal question before the Court of Claims was whether appellant's road was under federal control from January 1, 1918, to June 30, 1918. In deciding that question in the negative the Court of Claims was exercising a judicial function—indeed its judgment is based on such decision. It follows, that when the Commission decided this self-same question in the affirmative, some six months before the present action was brought, it also was acting judicially.

The very recent case of *Abilene & Southern Railway Company* v. *Interstate Commerce Commission* (a copy of which we print in the appendix hereto), decided by the Court of Appeals of the District of Columbia on November 2, 1925, is apt upon this point. There, it appeared

that the Abilene & Southern Railway presented its claim to the Interstate Commerce Commission under Section 204 of the Transportation Act and included in its claim the period from January 1, 1918, to July 1, 1918. The Commission held that the railway was under federal control during said period and therefore was not entitled to compensation under Section 204 of the Transportation Act—precisely as it held in the case of the claim which appellant filed. The Abilene & Southern brought a mandamus suit in the District Court to compel the Commission to ascertain the deficit of the railway's operating income under Section 204 for the period in question. The District Court denied the writ and the railway appealed. In affirming the District Court, the Court of Appeals said:

> "The statute here under consideration provides for the payment of a deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. This duty imposed upon the Commission is judicial in character, calling for a determination not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto.* This, we think, calls for more than a mere ministerial act to be performed by the Commission by express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of mandamus."

The opinion of the Court of Appeals is directly in accord with the principles laid down by the decisions by this Court in

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316, 324.

United States ex rel. Ness v. *Fisher,* 223 U. S. 683, 692.

---

* We suggest, though possibly the consideration of this question is not material upon this appeal, that Section 204 makes the Commission the exclusive judge of both the law and the facts as to any claims presented thereunder. The section does not provide for any method of reviewing the Commission's decision. It creates a special right and remedy against the United States. It seems thus to fall within the principle stated in *United States* v. *Babcock* (250 U. S. 328, 331).

III.

THE APPELLANT IS ENTITLED TO JUST COMPENSATION.

The Court of Claims said (Rec., 45):

> "that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical control of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made."

We have carefully examined the Court's findings to see if they support this conclusion. The only ones bearing upon it are as follows:

(1) That appellant did not turn over any of its earnings to the United States (Rec., 39);

(2) That the same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto (Rec., 39);

(3) That during said period there was no change in the manner or method of conducting the operation of said railroad (Rec., 39);

(4) That the Company received no orders with reference to the expenditures of money for maintaining its road or as to how it should be operated or maintained, other than those mentioned in the record* (Rec., 39);

The point at issue is whether, assuming that appellant's road was under federal operation, it is entitled to

---

* There is the further finding that appellant from December 28, 1918, to June 29, 1919, continued to operate its road as it had always operated it. (Rec., 40.) The period involved in this proceeding is from January 1, 1918, to June 30, 1918. Therefore, how, or by whom, the railroad was operated from December 28, 1918, to June 29, 1919, is clearly irrelevant. The words "from December 28, 1918, to June 29, 1919," cannot be a mere typographical error, which should read "from December 28, 1917, to June 29, 1918," for the findings of the lower Court were based upon a stipulation of facts. It cannot be assumed that in a proceeding based upon the premise that the United States was operating the railroad from January 1, 1918, to June 30, 1918, counsel would stipulate that, not the United States, but appellant, operated said road from December 28, 1917, to June 29, 1918.

compensation. Therefore, the above findings must be construed with the legal fact that the road was under federal control. So construed, they amount merely to this: The United States operated the road through the same persons who had theretofore operated it.** All operating expenses were incurred on behalf of the Government and all moneys collected belonged to the Government. As said in *Du Pont de Nemours Co.* v. *Davis* (264 U. S. 456, 462):

> "Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. Sec. 12, 40 Stat. 457."

When the road was released from federal control, the persons in charge turned the net operating income over to the Marion & Rye Valley instead of to the United States. The persons operating the road received no instructions from the Director General other than those shown by the record and they conducted operations in the same manner as theretofore.

The above in nowise precludes appellant from recovering just compensation. If the Government, during the period in question, was operating appellant's road "under a right in the nature of eminent domain,"* it follows that appellant is entitled to just compensation because of the deprivation of its right to use its road. The right to just compensation cannot depend upon whether the persons, who conducted the operations of the road, received orders which resulted in damage to the property, in reducing the income, or in increasing the expenses. A contrary contention or conclusion confuses

** In *Western Union Telegraph Co.* v. *Poston* (256 U. S. 662, 668), the Court held that the properties of the Telegraph Company were under federal operation, though such properties were managed and operated by the former managers and employees of the Western Union and in the name of that Company (see *supra*, p. 10).

* *North Carolina Railroad Co.* v. *Lee* (260 U. S. 16, 17).

the question of damages to property with the question of just compensation for the use of property. It is evident that this is precisely what the Court of Claims did, for it said (Rec., 44):

> "The just compensation to be awarded is to be measured by the losses caused to the property by the taking. * * *
>
> If any loss was incurred during that time, it was the result of the plaintiff's own operation and control of its own property, * * *"

and that the alleged taking did not disturb appellant's use of its property, "nor did it restrict its right to dispose of it," nor cause any pecuniary loss (see *supra*, p. 20).

Manifestly, the foregoing shows, that the Court of Claims never really assumed that appellant's road was under federal operation. The latter part of its opinion purports to make this assumption and then to decide that, even so, appellant is not entitled to just compensation. But if appellant's road was operated by the United States, then it was not operated by appellant; appellant's use of its property was not only disturbed but destroyed, and appellant's right to dispose of its road was limited to the sale of a mere reversion. Therefore, we submit, that the opinion of the Court of Claims upon this branch of the case is hopelessly wrong, since, though purporting to proceed upon the assumption that appellant's road was under federal control, it in fact proceeds upon the contrary assumption.

We presume, however, it will be claimed that the findings, summarized (*supra*, p. 20) show that the net income of the road from January 1, 1918, to June 30, 1918, accurately measures the compensation to which appellant is entitled, and that, since this net income was retained, appellant has already received all the compensation to which it is entitled by reason of the Government's use of

its road. In other words, that appellant has received as much as it would have received if its road had never been taken under federal control, and consequently has not been damaged by said control. But had the net income been turned over to the Government, instead of to appellant, it is manifest from the decisions that such net income would not afford a true measure of just compensation. What is actually earned by properties after their taking is no criterion of the value of their use at the time of such taking. We believe *Brooks-Scanlon Corporation* v. *United States* (265 U. S. 106) is conclusive upon this point. There, it was argued that just compensation for the expropriation of a contract to build a ship was the value of said ship when completed, less the contract price. But this Court said (p. 123):

> "We think it is not permissible so to calculate compensation. It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's right thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

It further said (p. 125):

> "Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have *their value at the time of the taking.*"

If, as held in the *Brooks-Scanlon* case, the measure of just compensation is the value of the right at the time of the taking, then what the road actually earned while under federal control can afford no test of just compensation. And this is true whether the net income was turned over to the United States or was turned over to appellant. The fact that appellant has, without objec-

tion on the part of the United States, retained this net income cannot change the rule for the admeasurement of just compensation.

The measure of compensation in this case is the value of the use of the properties, plus a sum equivalent to any deterioration that may have occurred from the time of their taking to the time of their restitution, less such sum as the appellant holds which belongs to the United States—the net income earned during the period that appellant's road was operated by the United States. The value of the use of the properties is the estimated value of such use at the time of the taking. It is

> "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

This is precisely the test adopted by the Board of Referees (Rec., 12, 13.) Once the correct measure is determined, the question of just compensation becomes one of fact only. Section 3 of the Federal Control Act (see Appendix, pp. 4, 5) provides that

> "the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated."

This means that, since the Board of Referees adopted the correct rule of measurement, its finding as to the amount of compensation should stand, unless the evidence before the Court of Claims showed that said amount was erroneous. But the findings of the Court of Claims as to past earnings (Rec., 40, 41) sustain rather than refute the finding of the Board. Aside from this, there was no evidence before, or findings of, the Court of Claims bearing on the subject, except the road's earnings while under federal control which, as we have seen, are immaterial.

The evidence taken before the Board of Referees is

not part of the record here and therefore it may be presumed that such evidence amply supported the Board's findings. Nor will it do to say that the report itself shows that the sole evidence was the past earnings of the road. It is true that the report states that there

> "is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental." (Rec. 12.)

But though the Board said that, therefore, the rental value

> "must be based largely on the evidence before us of plaintiff's earning power prior to December 28, 1917" (Rec., 13),

it also said that it must consider

> "evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect future revenues and expenses of a railroad." (Rec., 13.)

and that it would give weight in its conclusions to

> "the then known conditions and, in addition, such as might be reasonably foreseen by reasonably intelligent business men."

In view of the provisions of the statute, upon what theory can an award, based upon such evidence, and arrived at by such reasoning, be fairly set aside? In negotiations between an owner, who is willing to sell, and a purchaser, who desires to buy, the future earnings of the property are necessarily unknown. In the case of a railroad lease, there is no market value, and the negotiations necessarily have to be based upon past earnings, present conditions, and inferences as to future conditions.

When Congress enacted the Federal Control Act, it sought to provide a means to avoid litigation of this nature by prescribing the form of contract, which should be made between the Government and the railroads.

Manifestly, Congress endeavored to prescribe in that contract a method of arriving at a sum which would afford just compensation to the railroad owners on account of the use of their roads by the Government.* Had Congress prescribed more than what would amount to just compensation, it would have done an injustice to the taxpayers of the country; had it prescribed less, it would have done injustice to the railroad owners. Under the cardinal canons of construction no such unjust intentions can be attributed to the legislature. Therefore, Section 1 of the Federal Control Act represents the deliberate judgment of Congress, after having had the benefit of extended hearings and debate, as to the best method of determining just compensation. And by Section 1 the basis of determining just compensation was to take the average railroad earnings for the three years ending June 30, 1917.

While what constitutes just compensation is a judicial question, yet Congress, in enacting Section 1 of the Federal Control Act, endeavored, as practical men of affairs, to determine a concrete method of arriving at the sum, which would in all probability result from negotiations between an owner who was willing to sell the use of its railroad and a purchaser who was desirous of

---

* This is amply proved by the Congressional Debates:

Senator Smith, Chairman of the Committee on Interstate Commerce, said:

"This basis of compensation is made to enable the President to enter into an agreement with the roads in lieu of all their lawful and constitutional rights, thereby avoiding the delays and difficulties that would necessarily result from attempting to ascertain what would be just compensation by due process of law." (Cong. Rec., Vol. 56, Part 2, p. 1944.)

Senator Underwood said:

"Now, the issue before us at this time is in relation to the attempt on the part of Congress, responding to a request by the President of the United States, to provide the machinery by which the President can make agreements with the railroads as to what is just compensation, without forcing them to go to the courts to have the courts determine what the amount shall be." (Cong. Rec., Vol. 56, Part 3, p. 2435.)

buying such use for an indefinite period. Further, Congress started to consider this question immediately after the Government had taken possession of the railroads. Therefore, its judgment, as to the proper method of valuation, probably closely approximated that, which negotiators would have employed immediately before Government control of the roads was assumed. Consequently, the Federal Control Act itself affords a cogent analogy in support of the Board of Referees' award and against the judgment of the Court of Claims.

The judgment of the Court of Claims works a practical discrimination. As is well known, the Government has paid compensation to a large number of roads under the terms of Section 1 of the Federal Control Act. Should compensation be denied appellant, the result would be discriminatory.

VICTOR A. REMY,
Amicus Curiae.

APPENDIX.

PORTIONS OF THE FEDERAL CONTROL ACT PERTINENT TO THIS APPEAL (40 STAT. 451 ET SEQ.).

SEC. 1. That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so ac-

quired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenue derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it

in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of nonoperation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which

the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

SECTION 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, part-

nership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

SECTION 204 OF THE TRANSPORTATION ACT (41 STAT. 460 ET SEQ.).

REIMBURSEMENT OF DEFICITS DURING FEDERAL CONTROL.

SEC. 204. (a) When used in this section—

The term "carrier" means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation;

but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term "test period" means the three years ending June 30, 1917.

(b) For the purposes of this section—

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any, (hereinafter called "Federal control return"), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together, (hereinafter called "test period return"): *Provided*, That "test period return," in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Fed-

eral control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the differene between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computation shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

OPINION OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN ABILENE & SOUTHERN RAILWAY V. INTERSTATE COMMERCE COMMISSION.

Abilene & Southern Ry. Co.
vs.
Interstate Commerce Commission. } No. 4330.

VAN ORSDEL: Appellant railway company appeals from a judgment of the Supreme Court of the District of Columbia denying a writ of mandamus appellee, Interstate Commerce Commission, to require it to "ascertain the facts and to perform the duties required of it by section 204 of the Transportation Act, 1920; specifically, to ascertain the amount of the deficit in its railway operating income for the period from January 1, 1918 to July 1, 1918, during which the relator operated its own railroad or system of transportation, and to certify to the Secretary of the Treasury the amount payable to it under said section."

Section 204 of the Transportation Act of Feb. 28, 1920 (41 Stat. 456) among other things provided that any such railroad "which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic or connected with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation," could, on application to the Interstate Commerce Commission for the amount of the deficit sustained during the said period, have the same ascertained and determined. The duty was then imposed upon the Commission of certifying to the Secretary of the Treasury the amount so found payable to the carrier; when a warrant would be drawn in favor of the carrier upon the Treasury of the United States for the amount so certified.

The question here involved is whether or not the appellant railway company, during the period from January 1, 1918, to July 1, 1918, was under Federal control. If it was not, it has been denied the right to have the

amount of the deficit sustained by it during that period ascertained and determined by the Commission and the amount so found certified to the Secretary of the Treasury for payment.

When the case came on for hearing before the Interstate Commerce Commission it was heard upon the petition and exhibits, consisting of the Presidential proclamation of December 26th, 1917, taking over the railways and transportation lines as a war emergency, the agreement dated March 25, 1919 between appellant company and the Director General of Railroads, the rule to show cause, the answer of the Interstate Commerce Commission, the traverse to said answer, certain evidence taken at the hearing consisting of a transcript of hearings held December 1, 1922 and January 11, 1923 before the Interstate Commerce Commission, with certain exhibits introduced at the hearing and reports of the Commission. After full hearing and argument, the Commission held that appellant railway company was under Federal control during the period above stated, and that it could not claim compensation for deficit under section 204 of the Transportation Act.

Counsel for appellant, in their brief, assert that "jurisdiction of the court to issue the writ of mandamus as prayed for, was admitted by the pleadings." Jurisdiction cannot be conferred upon the court by admissions, stipulation or otherwise. Where a jurisdictional matter is involved it is the duty of the court to consider first, and determine whether there is authority to proceed. The statute here under consideration provides for the payment of a deficit to railroads not under Federal control. The deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. This duty imposed upon the Commission is judicial in character, calling for a determination not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto. This, we think, calls for more than a mere ministerial act to be performed by the Commission by express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of mandamus. To determine the matters raised by this appellant, this court is called upon to review the proceedings had before the

Interstate Commerce Commission and to determine whether or not error has been committed. To thus review the case in the present proceedings would amount to a conversion of the writ of mandamus into a writ of error. This, it has been universally held, cannot be done.

Decided November 2, 1925.

CONTENTS

PAGE

Act authorizing President to pay short lines guaranty specified should be construed as mandatory..... 25

Amount of Compensation..... 22

Apparent basis of Court's decision..... 2

Basis of Lower Court's Decision Untenable..... 3

Compensation for property taken..... 11

Congress cannot delegate its power to make laws..... 24

Congress cannot delegate power to recognize moral or honorary claims..... 23

Congress expressly recognized the rights of the courts ultimately to determine amount of compensation..... 17

Congress has power to authorize the President to enter into contractual relations with the carriers..... 18

Congress has the right to recognize moral or honorary as well as legal obligations..... 19

Does the court hold that the guaranty provisions of the Federal Control and Transportation acts are unconstitutional? 16

Effect of Court's decision that plaintiff's' property has not been taken 8

Express terms of statutory guaranty..... 27
- Appeal from decision of Board..... 39
- Carriers extended, to what..... 27
- Fact finding commission created..... 29
- Guaranty, The 27
- Just Compensation defined 28
- Written agreements not necessary..... 35

Far Reaching Effect of Court's decision in Instant Case.. 33

PAGE

Government's contention contrary to weight of authority.. 7

Intent of the Congress to extend the benefits of the Federal Control Act to roads not actually operated by the Director General clearly shown by subsequent legislation.. 14

In the exercise of eminent domain the taking of private property is a legislative, not a judicial, function..... 5

Interest of Cripple Creek and Colorado Springs Railroad Company 2

President's decision and method of operation not reviewable by the courts 6

Ratification by Congress of the President's proclamation.. 12

Status of Proceedings 1

Summary of Material Facts 4

True nature of the Case..... 3

Cases Cited

PAGE

Abilene & Southern Ry. v. Interstate Commerce Commission—(53 W. L. R. 806) 34
Adirondack R. Co. v. N. Y., 176 U. S. 336 8
Alabama Power Co. v. Gulf Power Co., 283 Fed. 606 5
Backus, Jr. & Sons v. Ft. Street Union Depot Co., 169 U. S. 557 8
Bragg v. Weaver, 251 U. S. 57 ..... 5, 8
Chappell v. U. S., 160 U. S. 499 5
Chase, v. U. S., 261 Fed. 833, 256 U. S. 1 25
Cincinnati, etc. Ry. v. Com. Clinton Co., 1 Oh. St. Rep. 778 24
Field v. Clark, 143 U. S. 649 24
Forbes v. U. S. (C.C.A.), 268 Fed. 273 5
Guthrie Natl. Bank v. Guthrie,—173 U. S. 528 23
Livingston v. Tanner, 14 N. H. 64 26
Mason *et al.* v. Fearson, 9 How. 248 ..... 25, 26
Mayor of New York v. Furze, 3 Hill (N.Y.) 612 26
Minor, *et al.* v. Mech. Bank of Alexandria, 1 Pet. 46 26
Mississippi and R. R. Boom Co. v. Patterson, 98 U. S. 403 8
Monongahela Nav. Co. v. U. S., 148 U. S. 312 ..... 5, 18
P. de Ronde & Co., Inc. v. U. S. Sugar Equalization Board, Inc., 299 Fed. 659 ..... 23, 25
Ralston v. Crittenden (C.C.), 13 Fed. 508 26
Sears v. Akron, 246 U. S. 242 8
St. L. & S. W. Ry. v. Ark., 235 U. S. 350 25
Shoemaker v. U. S., 147 U. S. 282 5
Supervisors, etc. v. U. S., 4 Wall. 435 ..... 25, 26
Town of Guilford v. Supervisors, etc., 13 N. Y. 143 23
Union Bridge Co. v. U. S., 204 U. S. 364 5
United States v. Cornell Seamboat Co., 137 Fed. 455, 202 U. S. 184 25
United States v. Forbes (D. C.), 259 Fed. 585 5
United States v. Gettysburg, E. Ry., 160 U. S. 668 5
United States v. Realty Co., 163 U. S. 427 ..... 19, 23

Statutes Cited

PAGE

Act of August 29, 1916, (39 S. L. 645) 4

Federal Control Act (40 S. L. 451)

Section 1 13

Section 3 ..... 1, 29

Section 14 14

Transportation Act, 1920 (41 S. L. 456) 1

Sec. 204 (a), (41 S. L. 460) 15

Other Citations

Corpus Juris, Vol. 20, page 624 8

Cyclopedia Law & Procedure, Vol. 15, page 63 7

House Majority Report, No. 294, accompanying H.R. 9685 ..... 17, 21

President's proclamation 4, 6, 12

President's Statement 9, 28

Senate, Minority, Report, part 2, No. 356 20

IN THE

Supreme Court of the United States

October Term, 1925.

MARION & RYE VALLEY RAILROAD CO., *Appellant*
vs.
UNITED STATES GOVERNMENT, *Appellee*
No. 315

BRIEF FILED ON BEHALF OF THE CRIPPLE CREEK AND COLORADO SPRINGS RAILROAD COMPANY, IN THE RELATION OF *AMICUS CURIÆ*

STATUS OF PROCEEDINGS

This case, as described in the opinion of the lower court (rendered May 26, 1924) is "a suit to recover the sum of $14,425.94, the amount of an award made by a Board of Referees duly appointed by the Interstate Commerce Commission under Section 3 of the Federal Control Act (40 S. L. 451) and the Transportation Act 1920 (41 S. L. 456) as the just compensation to the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ended June 29, 1918. The Director General of Railroads having refused to accept the report of the Board of Referees as a basis of settlement the plaintiff filed its petition in this court as provided by law." (R. p. 42.)

The petition was dismissed by the court. The court after

reviewing the facts in the case, summarized its conclusions in the following language: (R. p. 44.)

> "All of the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which were taken possession of by the government and actually operated and controlled by it. * * * We think that the property of the plaintiff was not taken by the government. If there was technical control of the property by the government it was of such a character that it would not cause any loss to the plaintiff and does not justify the award of any compensation."

The plaintiff filed a motion for a new trial and upon rehearing the court affirmed its former decision in an opinion rendered January 25, 1925.

INTEREST OF THE CRIPPLE CREEK & COLORADO SPRINGS RAILROAD COMPANY

The Cripple Creek & Colorado Springs Railroad Company has asked leave to file this brief in the relation of *amicus curiæ* because it has pending in the Court of Claims a somewhat similar case which may be affected by the court's decision in this case. While the facts in the two cases are not necessarily nor admittedly identical the same principles of law are involved in both cases.

APPARENT BASIS OF COURT'S DECISION

The lower court's decision is apparently based upon the assumption that this is a suit for damages sustained as a result of the alleged taking of plaintiff's property for a public use. The court finds that plaintiff has failed to show that its property was actually taken. In reaching this conclusion it has apparently adopted the view of government's counsel that plaintiff must not only show that the President by proclamation and order took over the control of its railroad but that the President or the Director General as his agent actually operated such railroad.

In other words, the method of utilization of the property involved is apparently treated as the determining factor in reaching a conclusion on the point whether or not the property was actually taken over.

BASIS OF LOWER COURT'S DECISION UNTENABLE

With all due deference we feel that this view is based upon an erroneous premise. While we do not, of course, deny that in a suit for damages sustained as a result of the exercise of the right of eminent domain the burden is on the plaintiff to show that its property has been taken, we submit that this burden was met in the instant case when it was shown to the court that the President by proclamation and order had taken over the possession, use and control of the properties involved and had placed them under the control of the Director General of Railroads. That it is not within the purview of the court to question the President's method of taking or of utilizing the property involved. Its sole province in such case is to determine the amount of compensation to which plaintiff is entitled. We further submit that under the statutes here involved the plaintiff is entitled to the compensation claimed whether or not its properties were taken over by the Director General.

TRUE NATURE OF THE CASE

We further suggest to the court that the claim of plaintiff against the United States is not, strictly speaking, a claim for damages sustained by reason of the taking of its property for a public use under the right of eminent domain but is a statutory claim for compensation guaranteed to it by the Congress which plaintiff has the option to assert as a substitute for the ordinary claim for damages to which it would be entitled under the Constitution.

SUMMARY OF MATERIAL FACTS

Adverting briefly to the facts in the case, the record shows that by a proclamation of the President promulgated December 26, 1917, effective December 28, 1917, under authority of an act of Congress approved August 29, 1916 (39 S. L. 645), the President took possession and assumed control, *inter alia*:

> "* * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads * * *, including also terminals * * * and all other equipment and appurtenances commonly used upon and operated as a part of such rail or combined rail and water systems of transportation." (R. p. 28.)

This language of the proclamation clearly and unequivocally covers the property of the plaintiff. The act of Congress under which this proclamation was issued, so far as applicable, reads as follows:

> "The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, equipment, and for such other purposes connected with the emergency as may be needful or desirable." (Sec. 1, Act Aug. 29, 1916, 39 S. L. 645.)

The obvious purpose of this provision was to vest in the President a discretion to determine when a necessity existed for taking over the transportation systems of the United States as a war measure and the power to assume control of and operate such systems in such manner as he deemed advisable. It can hardly be denied that this is ordinarily a legislative rather than an administrative power. It is not a judicial function.

IN THE EXERCISE OF EMINENT DOMAIN THE TAKING OF PRIVATE PROPERTY IS A LEGISLATIVE NOT A JUDICIAL FUNCTION

The usual rule in such cases is very clearly stated in a note to *Alabama Power Company v. Gulf Power Company, et al.* (283 Fed. 606) as follows:

> "The rule is usually stated to be that where property is sought to be taken or condemned for a public use whether such property is necessary to that end *is a legislative question* and the determination thereof by the authorized legislative body can not be questioned in a proceeding to take or condemn the property. *Shoemaker v. U. S.*, 147 U. S. 282, 37 L. ed. 170; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 37 L. ed. 463; *U. S. v. Gettysburg, E. Ry.*, 160 U. S. 668, 40 L. ed. 576. And a hearing on the question of necessity is not essential to due process of law demanded by the Fourteenth Amendment. *Bragg v. Weaver*, 251 U. S. 57, 40 Supr. Ct. 62, 64 L. ed. 135. The general rule is modified to the extent that, when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be probably without reasonable foundation. Justice Peckham in *U. S. v. Gettysburg*, E. Co., 160 U. S. 668, 40 L. ed. 576." (Italics ours.)

While this is the general rule, as pointed out in the same foot note:

> "The power to determine the question of necessity for public use may be delegated by Congress to executive officials, and their findings on this question in the exercise of such delegated power *is not subject to review by the courts. Chappell v. U. S.*, 160 U. S. 499, 40 L. ed. 510; *Union Bridge Co. v. U. S.*, 204 U. S. 364, 51 L. ed. 523; *Forbes v. U. S.* (CCA) 268 Fed. 273; *U. S. v. Forbes* (DC) 259 Fed. 585."

PRESIDENT'S DECISION AND METHOD OF OPERATION NOT REVIEWABLE BY THE COURTS

The Congress having delegated to the President the power to determine when any necessity existed for taking over the railroad systems of transportation under the exercise of the right of eminent domain and the power to assume control of and operate such systems, and the President, in the exercise of these powers, having determined that such necessity did exist and having placed in the Director General of Railroads the supervision and control of the properties so taken over, it is respectfully submitted that it is not within the province of the courts to review his action to determine whether such necessity existed or to question his method of operating the properties so taken over.

The President's proclamation provided that: (R. p. 28.)

> "It is hereby directed that the possession, control, operation and utilization of such transportation systems *hereby by me undertaken,* shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, *so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employees of said systems of transportation.* Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the name of their respective companies." (Italics ours.)

Under his language it seems clear that from the effective date of this proclamation the possession, control and utilization of all transportation systems were taken over by the United States. Obviously the Director General could not, over night, perfect an organization for the operation of several thousand miles of railroads in the United States owned by several hundred

different companies, and as a purely practical question it became and was necessary to utilize as agencies of the Government for the purpose of operating these systems of transportation, the existing railroad organizations. We respectfully submit that the possession and control in legal effect was as complete while these roads were operated for the United States by their own officers, directors and employees as when other officers, directors and employees were substituted therefor. The mere change of title, for example, of a president or general manager to that of "Regional Director" or "Director in Charge of Operation," did not change his legal status. He was the agent of the Government before as well as after such change. We submit, therefore, that the taking of these properties was more than technical; it was an actual taking from the effective date of the proclamation.

THE GOVERNMENT'S CONTENTION CONTRARY TO WEIGHT OF AUTHORITY

The Government apparently assumes that it is inherently within the province of the courts to determine what constitutes a taking of property and that this question is to be determined in the last analysis by the use actually made of property alleged to have been taken.

In dealing with this question in the lower court counsel for the Government in their brief stated:

> "The question of whether possession had been taken of any particular railroad or class of railroads was a judicial one, not a legislative one. Congress could not direct the court as to how such judicial question should be decided any more than it could direct the court as to the measure of damages for a taking of private property under the power of eminent domain."

As we have before suggested, this theory seems to us to be contrary to a long line of court decisions. For a collection of cases on this point see 15 *Cyc.* 630 where the rule is stated to be as follows:

> "In the absence of some constitutional or statutory pro-

vision to the contrary the necessity and expediency of exercising the right of eminent domain are questions essentially political and not judicial in their character. The determination of these questions belong to the sovereign power; the legislative determination is final and conclusive, and the courts have no power to review it. It rests with the legislature not only to determine when the power of eminent domain may be exercised, but also the *character, quality, method, and extent* of such exercise. And this power is unqualified other than by the necessity of providing that compensation shall be made." (Italics ours.)

The same rule with additional cases in support thereof is set forth in 20 *Corpus Juris* 624.

In the recent case of *Bragg v. Weaver* (251 U. S. 58) this Court in discussing the question of condemnation, speaking through Mr. Justice Van Devanter, said:

> "Where the intended use is public the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. *They are legislative questions no matter who may be charged with their decision* and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." (Citing *Miss. & R. R. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *A. Backus, Jr. & Sons v. Ft. Street Union Depot Co.*, 169 U. S. 557, 48 L. ed. 853; *Adirondack R. Co. v. New York*, 176 U. S. 336, 44 L. ed. 492; *Sears v. Akron*, 246 U. S. 242, 62 L. ed. 688.) (Italics ours.)

It will be observed that according to the authorities referred to the Congress has the right to determine not only when and under what circumstances property may be taken but it may also prescribe "the mode, conditions and agencies" for the exercise of the right of eminent domain and the "character, quality, method and extent" of such exercise.

EFFECT OF LOWER COURT'S DECISION THAT PLAINTIFF'S PROPERTY HAS NOT BEEN TAKEN

Applying these principles to the instant case, let us consider the effect of the lower court's decision when it held that there

had been no taking of the properties here involved. It can not be denied that Congress in the exercise of its constitutional power authorized the President to take over the transportation systems of the United States when he deemed it necessary as a war measure. The President, who was authorized to determine when such necessity existed, made a record of his decision in the usual and appropriate manner, that is, by proclamation and order. The language of the proclamation is unequivocal. After reciting the authority under which he acted and after designating the Director General of Railroads as the agency to supervise and control the management of such roads, and after outlining the procedure to be followed pending the organization of such agency, the proclamation states: (R. p. 29.)

> "From and after twelve o'clock on said 28th day of December, 1917, all transportation systems included within this order and proclamation shall *conclusively* be deemed within the possession and control of said Director General *without further act or notice.* But for the purpose of accounting said possession and control shall date from twelve o'clock on December 31, 1917." (Italics ours.)

This proclamation and order are dated December 26, 1917. On the same date the President gave out a statement in which he said: (R. p. 30.)

> "I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so."

It will be noted that in this statement he refers to the fact that he has exercised the power in question. He does not state that he will exercise this power at some future date.

It would be difficult if not impossible to record in language more free from ambiguity the decision that the President was authorized to make and did make under the act of Congress here involved. And yet the court is asked by the Government in effect to treat this proclamation as a legal nullity on the theory that some

further act was necessary to complete the taking of the property involved. In discussing this question before the lower court counsel for the Government in their brief stated: (R. p. 16.)

> "The proclamation did not purport to take possession of any railroad in *presenti*, but rather constituted an announcement that possession would be taken in the future—an announcement that might or might not be fulfilled. The proclamation was dated December 26, 1917, and while using words of present import, announced the taking possession of the systems of transportation therein described in the future; to wit, at twelve o'clock noon, December 28, 1917, two days thereafter. We need not argue that the President did not on the 26th day of December take possession of the railroads at 12 o'clock noon, two days later. The proclamation was therefore but an anonuncement of an intention to take possession of such railroads two days subsequent to the announcement thereof, an intention that might or might not be carried into effect, or that might be carried into effect as to some railroads and abandoned as to others."

With all due deference we find it difficult to understand upon what theory this interpretation is placed upon the language used by the President. The proclamation came into effect as of the date specified therein. As stated its terms are unequivocal. The mere fact that it was prepared and dated two days prior to the effective date certainly can not be said to invalidate it. It provided in express terms that no further act or notice shall be necessary to complete the taking of the properties involved. But notwithstanding this the Government's counsel stated in their brief in the lower court that:

> "The proclamation of the President was very broad in its terms and if the action of the President and his agents, following the issuance thereof in dealing with plaintiff's railroad had been in harmony therewith, we would not be insisting on the foregoing contention."

The contention referred to was that the President had not by his proclamation taken posession of the railroad in question.

We are here dealing with an executive order and proclamation of the President. By analogy let us assume that in an equity

suit the court should issue an order on December 26 restraining and enjoining the defendant from going on certain premises or from taking some other action from and after December 28 at 12 o'clock noon. Would this be treated merely as an announcement, on the part of the court, of an intention at some future date to issue an injunction? We hardly think that such a position could be sustained and we submit that the same principle is here involved.

Under these circumstances we respectfully suggest that the effect of the decision in holding that the proclamation did not constitute a taking is to substitute the court's discretion for that vested in the President by the Congress. The President in no uncertain terms states in his proclamation that the taking of the properties involved shall be complete without any further notice or action. The lower court held that further action was necessary to complete the taking of the property though it did not specify nor undertake to show what further action was necessary.

COMPENSATION FOR PROPERTY TAKEN

While the right to determine when private property may be taken for public use is a legislative right, the power to determine the question of damages or compensation to be paid to the owner of such property is unquestionably vested in the courts. It needs no citation of authority for the proposition that it is not within the power of Congress by statute to limit the amount of compensation to be paid to the owner of private property taken for a public use. The due process of law clause in the Constitution clearly vests this power in the courts. Recognizing this well-established principle of law and apparently realizing that the adjudication of this question (where properties of such enormous value located throughout the United States were involved) would necessarily consume a long period of time and would throw a stupendous burden on the courts of this country, as a substitute or rather as an alternative for this procedure under the Constitution, the Director General was

directed by the President to seek to reach an agreement with the various railroads involved on this question of compensation. The proclamation on this point contains the following provisions: (R. p. 29.)

> "The Director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.
>
> "But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed."

It was thus made clear that while the Director General was authorized to enter into negotiations with the carriers and to agree upon compensation, this authority was not intended by the President as an attempt on his part to impair their constitutional right to have the question of compensation due them adjudicated in a court of competent jurisdiction. It was merely an alternative remedy given to the carrier.

RATIFICATION BY CONGRESS OF THE PRESIDENT'S PROCLAMATION

As we have seen, under the clear and unambiguous language of the President's proclamation, the possession, use and control of all railroads in the United States was taken over by the President on December 28, 1917. By an act of Congress, approved March 21, 1918 (40 S. L. 451) commonly known as the Federal Control Act, nearly four months thereafter, the action of the President

in authorizing the Director General to enter into agreements as to compensation with the carriers in effect was confirmed and ratified by Congress. This act act provided, *inter alia:*

> "Sec. 1. That the President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads and systems of transportation (called herein "carriers"), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission that during the period of such Federal control it shall receive as just compensation an annual sum payable from time to time in reasonable instalments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum, equivalent as nearly as may be, to its average annual railway operating income for the three years ended June 30, 1917."

Presumably to remove any doubt as to what roads had been taken over and were under Federal control as a result of the President's proclamation, there was incorporated in this same section of the Federal Control Act, the following provision:

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this act."

This language, like that of the proclamation, is free from ambiguity and extends the benefits of the Federal Control Act not only to those roads that were actually operated by the Director General but to those competing with or connecting with such roads. This being true, while we contend that for the period here involved the plaintiff was actually under Federal control and that its property had been actually taken over by the Government, under the language of the act it is immaterial whether

or not it was actually operated by the Director General so long as it competed with or connected with a railroad under Federal control.

INTENT OF THE CONGRESS TO EXTEND THE BENEFITS OF THE FEDERAL CONTROL ACT TO ROADS NOT ACTUALLY OPERATED BY THE DIRECTOR GENERAL CLEARLY SHOWN BY SUBSEQUENT LEGISLATION

It was unquestionably the purpose of the Congress to extend the benefits of the Federal Control Act to connecting and competing carriers whether or not their physical operations were directed and controlled by the Director General. This view is confirmed by the action of the Congress in incorporating section 204 in the Transportation Act, 1920.

Section 14 of the Federal Control Act provides:

> "Section 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace; *PROVIDED HOWEVER*, That the President may, prior to July 1, 1918, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. *No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.*" (Italics ours.)

Apparently realizing that the concluding paragraph of this section to the effect that "no right to compensation shall accrue to such railroads from and after the date of relinquishment for

the property so relinquished" operated as an injustice to those owners to whom properties were returned for operation in competition with railroads operated by the government, by a later act of the Congress known as the Transportation Act, 1920 (Sec. 204 a, 41 S. L. 460) approved February 28, 1920, this provision was repealed and express provision was made for reimbursement of deficits sustained for the remainder of the period of Federal control by those carriers which had been released from Federal control by the Director General and a method was prescribed for determining the difference in the average railway operating income of such carriers as between the remainder of the Federal control period and the corresponding months of the three year period ended June 30, 1917, described as the "test period."

In the instant case we are not concerned with the guaranty provided by the Transportation Act, 1920, since the claim here involved is for compensation for that period of Federal control which preceded the date of relinquishment (*i. e.*, January 1 to June 30, 1918) for which period section 1 of the Federal Control Act authorized the President to guarantee to carriers that they shall receive from the operation of their properties a sum equivalent as nearly as may be to the average railway operating income for the corresponding period of the test period, *i. e.*, for the three year period ended June 30, 1917.

It thus appears that the Congress by the enactment of statutes under which these proceedings are had, has expressly recognized the fact that the transportation systems of the United States had been taken over and has expressly prescribed the compensation to which the owners are entitled if accepted in lieu of adjudicated compensation for damages sustained. And yet the lower court has held that because these properties were not managed in some other manner not specified or because the President or the Director General did not take some further or different action, the taking was incomplete and connecting or competing carriers are not entitled to the guaranty of Congress.

DOES THE COURT OF CLAIMS HOLD THAT THE GUARANTY PROVISIONS OF THE FEDERAL CONTROL AND TRANSPORTATION ACTS ARE UNCONSTITUTIONAL?

In dealing with the question of compensation guaranteed by Congress in its opinion the court says: (R. p. 44)

> "The plaintiff insists that both the President and the Congress provided for the compensation to which the railroads under Federal control would be entitled, the President in his Proclamation and the Congress by the act of February 28, 1920, 41 Stat. 456, and the act of March 21, 1918, 40 Stat. 541. Without going into the method of compensation set out in the statutes it is sufficient to say that the question of compensation is a judicial question, and just compensation must be determined by the evidence produced before the court. The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute. The just compensation to be awarded is to be measured by the loss caused to the property by the taking."

From this it appears that the lower court classifies the guaranty provision of the Federal Control and Transportation Acts as an attempt on the part of Congress to usurp powers that are inherently judicial. The opinion leaves us wondering whether it was the intention of the lower court to declare unconstitutional those provisions of these acts which prescribe the amount of compensation to be paid to the railroad companies for the temporary use of their properties. We assume, of course, that this was not the court's intention since such a decision would necessarily have a far-reaching effect, the Government, through the Director General and the Interstate Commerce Commission, having already made settlements with the railroad companies under these provisions which involve many millions of dollars. This being a matter of public record and a fact of which the lower court would necessarily take judicial notice, if its decision was intended to invalidate these set-

tlements this subject would, of course, have been expressly dealt with in the court's opinion.

The question then remains, if these provisions are not treated as invalid, what effect is to be given them? The opinion deals with them as a "suggested method of settlement" which is not binding on the court. On this point the lower court, as we have seen, says: (R. p. 44)

> "The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute."

It is, of course, true that the adjudication of the amount of compensation or damages to which the owner of property becomes entitled when it is taken for a public use is a judicial and not a legislative function, but the Congress has not deprived nor attempted to deprive the owner of the property of the right to have this question adjudicated by the courts.

CONGRESS EXPRESSLY RECOGNIZED THE RIGHT OF THE COURT ULTIMATELY TO DETERMINE AMOUNT OF COMPENSATION

As we have already seen the President in his proclamation fully recognized the inherent power of the court to finally determine the amount of compensation to which the carriers became entitled by reason of the taking of their properties. The report of the committee to which this bill was referred by the House shows clearly that the Congress likewise recognized this inherent right of the courts and did not attempt to invade it but merely offered the carrier *an alternative method* of settlement. The report states:

> "The act of August 29, 1916, authorized the President in time of war to assume the possession, control and use of transportation systems. It provided no method for determining the just compensation of the owners of properties thus applied to public use. The right to just compensation is a constitutional right; *the determination of the amount of just compensation is a judicial and not a legislative question.*

"But Congress may and should provide speedy and easily available judicial machinery for determining this just compensation. (*Monongahela Nav. Co. v. U. S.*, 148 U. S. 312.) It is also desirable that the owners of the property should, *instead of being required to resort to the courts for their rights, be made such offers for just compensation as will* probably result in an agreement between them and the United States determinative of their rights. * * * Section 1 is a fundamentally important section; for it sets the outside limits of the expected agreement. *Its sole function is to provide a basis of just and proper agreements as may eliminate litigation.*" (Italics ours.) Report No. 294, accompanying H. R. 9685, 65th Cong., 2d Sess., Feb. 9, 1918.)

It is clear, therefore, that this method of settlement was offered by the Congress as an *alternative method* for that of settlement by litigation and was not intended to deprive the owner of his rights to litigation.

THE CONGRESS HAD POWER TO AUTHORIZE THE PRESIDENT TO ENTER INTO CONTRACTUAL RELATIONS WITH THE CARRIERS

It will no doubt be conceded that the Congress had power, after authorizing the President to take over the transportation systems of the United States, to give him authority to agree with the carriers as to the amount of compensation which should be paid for the temporary use of their properties provided such amount did not exceed the limits prescribed by Congress. In this view we take it that the lower court's decision is to the effect that those carriers whose lines were actually taken over and operated by the President could by agreement determine the amount of compensation to be paid, but the short lines whose properties were not in the opinion of the lower court actually taken over and operated did not become entitled to the benefits of the act.

While we contend and have endeavored to show that plaintiff's properties were taken over by the United States and that it

thereby became entitled to the compensation guaranteed by the Congress, we submit that even if this court should decide that there was no actual taking of plaintiff's property, plaintiff is nevertheless entitled to the amount of compensation prescribed by the Federal Control Act.

CONGRESS HAS THE RIGHT TO RECOGNIZE MORAL OR HONORARY AS WELL AS LEGAL OBLIGATIONS

Let us assume for the purpose of argument that the properties of plaintiff were not taken over and were never operated by the Government and that notwithstanding this fact the Congress guaranteed to the plaintiff that its operating income during the Federal control period should be equal to its average operating income for the corresponding period of the test period. If so construed the question arises, Was it within the power of Congress to authorize such a guarantee?

It is well settled that the Congress has the power to recognize and to provide for the payment of claims against the government which could obtain no recognition in a court of law but which grew out of general principles of right and justice and are based solely upon considerations of a moral or honorary nature. *U. S. v. Realty Co.*, 163 U. S. 427, 441-443.

In the instant case it is clear that the guaranty provided by the Federal Control Act is extended to "every railroad not owned, controlled or operated by another carrier company and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control or which connects with such railroad and is engaged as a common carrier in general transportation." It can hardly be denied that the appellant comes within this language of the act as a connecting carrier of a road operated by the President and under the language of the act is entitled to the benefits thereof. The reason for extending the benefits of the act to such carriers is clearly shown in the minority report of the committee to which

Senate bill 3751 was referred. The Senate bill as first reported out apparently made no provision for the guaranty of compensation to the so-called short lines. The minority report in dealing with this question states:

> "It is obvious that there are a large number of short line roads which will not be affected by government operation, and as to these nothing is said; but on the other hand, there are a large number of comparatively short roads which compete with the trunk lines for traffic, and these roads will be absolutely destroyed if some arrangement is not made for their protection. While in a sense their operation by the government may not be necessary for the successful conduct of the war, they have all been built to give the communities which they serve relief from the monopoly of the trunk lines. The welfare of the localities through which they pass is dependent upon their existence and public life demands their full and complete operation. If their relations with the trunk lines are destroyed by the diversion of traffic which they have heretofore carried the outcome is perfectly clear. When the war ends and the big systems are restored these small, independent, competitive roads will fall into the hands of the great systems for substantially nothing. It is probable that if these roads were taken over the liability which the government assumes would not be materially, if at all, increased, but even if it is enhanced by a small amount, the government can well afford to take something from the excessive compensation which it proposes to guarantee to the big roads in order to save some of the little ones." (Minority report No. 356, Senate, 65th Cong., 2d Sess. Part 2. 2/11/18.)

The bill as finally enacted included the provision above referred to which extended to competing and connecting short lines substantially the same guaranty that was extended to lines actually operated. This may be regarded as a moral or honorary obligation which the Congress clearly had the right to recognize.

The court can and should take judicial notice of the fact that the government's control of traffic on the trunk lines and its consequent diversion from normal channels necessarily

deprived the short lines of some of the revenues normally earned. That this was true in the instant case is shown by the fact that the appellant's operating income during this period was less than the average operating income throughout the test period.

Counsel for the Government in their brief in the lower court described the test period as a period

> "When confessedly the conditions were entirely dissimilar to those involved during the time in controversy and when carriers generally were enjoying a prosperity without parallel before or since."

We agree that the conditions during the Federal control period differed from conditions during the test period and it was because this difference was inevitable that the Congress saw fit to guarantee the short lines against the necessarily resultant loss. We can not agree, however, with the statement of government's counsel that during the test period the carriers generally enjoyed a prosperity without parallel before or since. On this point the report of the committee in dealing with section 1 (which prescribes the compensation to be paid to carriers) states:

> "Its sole function is to provide a basis of just and proper agreements as may eliminate litigation. * * * Naturally there has been much discussion as to the justice of the proposed settlements. Your committee has dealt with this practice as a practical question. * * * The facts are that these companies have, during this three year period (referring to the test period) had certain earnings; that they are entitled as a constitutional right to have their just compensation adjudicated by the courts; that it is probable—almost certain—that any court would take their average earnings for some reasonable period as persuasive, perhaps conclusive, of such compensation. Viewing their constitutional right in connection with the great public need for stabilizing the security market—of restoring impaired confidence—your committee are of the opinion that the average earnings of three years is a fair basis for settlement of the rights of most of these owners against their government and ought to be approved.

21

1915 was one of the worst years in recent railroad history; the other two years were prosperous years. The average of the three years is, therefore, a fair test of earning power. Moreover, the investment in the properties of railroads now taken over has been increased at the rate of about $375,000,000 a year. The properties the government now has the use of are larger by about $1,000,000,000 than the properties that made the earnings of 1915 taken as one of the three years in order to reach the standard return." (Italics ours.)

So long as we treat this guarantee of compensation to the short lines as the recognition of a moral or honorary obligation of the government, it is hardly necessary to consider whether or not the amount guaranteed is excessive since this was purely a question for the Congress to determine. It is hardly fair to the carriers, however, to state that the entire test period was a period of unprecedented prosperity when the Congress had found upon investigation of the subject that one year at least of the test period was one of the worst in recent railroad history.

AMOUNT OF COMPENSATION

While we have no interest in the amount of the award in this particular case, we are interested in the principle to be followed by the court in determining the amount of compensation if any and respectfully suggest that where a carrier exercises the option of asserting its claim provided by section 1 of the Federal Control Act it is entitled to the amount the President is authorized by that statute to guarantee to such carrier. The position of the Government is, of course, that the President is vested with the widest possible discretion in determining the amount that may be guaranteed. This may be true where the settlement is made by agreement between a carrier whose properties were taken over and operated and the settlement is of a legal obligation. A different situation results, however, where the guaranty of the Congress is the recognition of a moral or honorary obli-

gation. While we contend that in either case the act should be construed as requiring the President to settle with all carriers on the same basis, we suggest to the court that this is especially true where the guaranty is based upon a moral or honorary obligation.

As stated by the court in the case of *United States vs. Realty Company, (supra)* when speaking of moral or honorary claims against the government:

> "Their recognition depends solely upon Congress and whether it will recognize claims thus founded must be left to the discretion of that body."

And again, in dealing with the same subject, the court said (p. 440):

> "To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof."

CONGRESS CAN NOT DELEGATE POWER TO RECOGNIZE MORAL OR HONORARY CLAIMS

It is thus clear that the recognition of moral claims against the government is solely a congressional power and in the exercise of that power the Congress alone can determine what claims shall be recognized and paid. It can not delegate to an administrative body an absolute discretion to recognize such claims but can, of course, prescribe the conditions under which such claims may be recognized and paid and vest in an administrative body or official the right to determine when the facts bring it within the class of cases that have been recognized. *Guthrie National Bank v. Guthrie,* 173 U. S. 528; *U. S. v. Realty Co.,* 163 U. S. 427; *Town of Guilford v. Supervisors, etc.,* 13 N. Y. 143; *P. deRonde & Co., Inc., v. U. S. Sugar Equalization Board, Inc.,* 299 Fed. 659.

Applying these principles to the case at bar it is clear that Congress has extended to carriers connecting or competing with

railroads under the control and operation of the Government a guaranty that their earnings shall be equal to the average net earnings during the test period, and has delegated to the executive branch of the government the power to determine (a) which are connecting or competing carriers and (b) the difference between such carriers' operating income during the two periods involved.

The Congress could not vest in the executive branch of the government an arbitrary discretion to determine which roads should receive and which should not receive such guaranty since this would involve a delegation of its power to recognize moral or honorary obligations which power is vested solely in the Congress. Such delegation would clearly be a delegation of the full legislative power and discretion with respect to the payment of such claims and would hence be invalid. *Field v. Clark,* 143 U. S. 649, 692-694.

CONGRESS CAN NOT DELEGATE ITS POWER TO MAKE LAWS

While the Congress can not, of course, delegate its power to make a law, it can, as stated in *Field v. Clark* (*supra*):

> "Make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend."

In defining this distinction the case of *Cincinnati, etc. Ry. Co. v. Commissioners of Clinton Co.,* 1 Ohio State Reports, 778, is quoted from as follows:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made."

If we are correct in our view the statutes here involved, if treated as a recognition of a moral or honorary obligation, must be declared unconstitutional if they are construed

as vesting an absolute discretion in the President. This being true they should not be so construed if any other construction is possible. It hardly needs any citation of authority for the proposition that where one construction necessitates declaring an act unconstitutional it should not be adopted if any other construction is possible which would not lead to this result. As stated by Mr. Justice Pitney, in *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 59 L. ed. 265:

> "No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority."

ACT AUTHORIZING PRESIDENT TO PAY SHORT LINES GUARANTY SPECIFIED SHOULD BE CONSTRUED AS MANDATORY

It is at once apparent that if the power vested in the President to pay the short lines the guaranty provided by statute is treated as mandatory and not merely permissive no necessity exists for declaring these acts unconstitutional. It has been held with great uniformity that what a public officer is empowered by Congress to do for others and it is beneficial for them to have done, the law holds that he ought to do, and that in such instances the language used by the legislature, though permissive in form, is in fact peremptory. *Supervisors, etc. v. U. S.*, 4 Wall. 435; *Mason, et. al. v. Fearson*, 9 How. 248; *U. S. v. Cornell Steamboat Co.*, 137 Fed. 455, affirmed in 202 U. S. 184; *P. de Ronde & Co., Inc., v. U. S. Sugar Equalization Board, Inc.*, 299 Fed. 659. In such statutes the word "authorize" has many times been held to mean "direct." In *Chase v. United States*, 261 Fed. 833, affirmed in 256 U. S. 1, the court (p. 837) said:

"An examination of the legislation of Congress shows that in many of the acts of Congress the word 'authorize' is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word 'authorize' the other words 'in his discretion' are added. As was said by the Supreme Court of the United States in *Mason et al. v. Fearson*, 9 How. 248, 13 L. ed. 125:

" 'Whenever it is provided that a corporation or officer, "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * * * Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty'." *Mayor of New York v. Furze*, 3 Hill (N.Y.) 612; *Minor et al. v. Mechanics Bank of Alexandria*, 1 Pet. 46, 7 L. ed. 47, and note; *Livingston v. Tanner*, 14 N. H. 64; *Ralston v. Crittenden* (C.C.) 13 Fed. 508; *Supervisors Rock Island Co. v. U. S.*, 4 Wall. 435, 18 L. ed. 419.

Applying these principles to the instant case we submit that appellant is entitled to the difference between the operating income during the period of Federal control involved and its average operating income during the corresponding months of the test peroid. That the power vested in the President and the Board of Referees is to determine, first, whether plaintiff is under Federal control or is a connecting or competing carrier; in other words, whether the plaintiff is entitled to the benefits of Section 1 of the Federal Control Act; second, what constitutes the deficit sustained within the meaning of the act here involved.

EXPRESS TERMS OF STATUTORY GUARANTY

TO WHAT CARRIERS EXTENDED

As we have already seen, in defining carriers entitled to the benefits of the Federal Control Act, Congress expressly provides: (Sec. 1)

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control,' as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefits of all the provisions of this act; *PROVIDED HOWEVER*, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both."

It can hardly be denied that under the terms of this provision of the act plaintiff is entitled to its benefits.

THE GUARANTY

Section 1 of the Federal Control Act, so far as applicable to the issue here involved, further provides:

> "That the President, having in time of war taken over the possession, use, control and operation (called herein 'Federal control') of certain railroads and systems of transportation (called herein 'carriers'), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable instalments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent *as nearly as may be* to its average annual railway operating income for the three years ended June 30, 1917." (Italics ours.)

Inasmuch as the appellant is entitled to the benefits of this act under the language of that part of section 1 first above quoted and since it made operating returns to the Interstate Commerce Commission, it is clear that the President was authorized to guarantee the operating income specified and that the appellant is entitled to a settlement on the same basis as other carriers under Federal control.

JUST COMPENSATION DEFINED

Before considering other provisions involved, the court's attention is especially directed to the language used by the Congress in that part of Section 1 just above quoted to the effect that the President may guarantee to any carrier entitled to the benefits of the act that "it shall receive *as just compensation* an annual sum * * * not exceeding a sum equivalent, *as nearly as may be,* to its annual railway operating income for the three years ended June 30, 1917." (Italics ours.) In other words, the Congress specifically defines the term "just compensation" as used throughout the statute as a sum equivalent as nearly as may be to the average annual railway operating income for the three years ended June 30, 1917.

Attention is also directed to the statement of the President when he took over the railroad systems of the country (R. p. 30) wherein he said:

> Immediately upon the reassembling of Congress I shall recommend that these definite guaranties be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government, and second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the government must now use under its own direction or else suffer serious embarrassment.

In the consideration of these statutes it is important to bear this in mind. In the discussion which follows we shall refer to the difference between the railway operating income of the plaintiff as between the test and Federal control periods as the "statutory just compensation" since the Congress has given to these words this specific meaning.

Fact Finding Commission Created

Section 3 provides in part:

> "That all claims for just compensation not adjusted (as provided in section 1) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington * * *. Said boards shall give full hearings to such carriers and to the United States, shall consider all the facts and circumstances and shall report as soon as practicable in each to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section 1. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized in section 1. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

We respectfully suggest to the court that the sole purpose

and effect of this section, in so far as it relates to the Board of Referees, was to create a board for the purpose of determining by investigation the true facts in the case where the President or the Director General and the carrier failed to agree upon the facts. This Board was not and could not have been intended by Congress to perform the functions of a court and to adjudicate the question of compensation due the owner for the taking of its private property.

As we have seen, the Congress had prescribed as just compensation for each carrier entitled to the benefits of the act a sum equivalent *as nearly as may be* to its annual railway operating income for the corresponding months of the test period. In asserting its claim for this amount under the guaranty prescribed by the Congress, it was, of course, necessary for the carrier to credit the government with the amount of net operating income actually received and its claim for "statutory just compensation" is, therefore, limited to the difference betwen its railway operating income as between the two periods involved.

Opinions might well differ as to the amount that represented this difference. Many complex questions of accounting are necessarily involved. Differences in cost of labor and materials as between the two periods must be adjusted or equated. Expenditures made during each period must be classified as operating or maintenance expenses or as capital expenditures. Items charged to depreciation must be considered and the Congress obviously assumed that the President and the carrier might reasonably disagree as to the amount that represented the difference in railway operating income as between the two periods.

In the case of such disagreement or failure to agree the carrier was not required under the act to abandon its claim for the "statutory just compensation" guaranteed to it and to sue for damages for the taking of its property but the procedure outlined in section 3 was manifestly incorporated so as to make it possible for the carrier to have determined by an authorized fact finding commission, acting in the

capacity of an arbitration board, the "statutory just compensation" guaranteed to it.

It will be observed that this board is not authorized to determine what is a just or reasonable or fair compensation, but after investigation it was required to report to the President "the just compensation," that is, the compensation prescribed by Congress. That this was the intention of the Congress is clearly shown by the context and by the history of this legislation to which reference has already been made.

It is at once obvious that if the Congress intended the carrier to be deprived of its right to claim the "statutory just compensation" in the event of disagreement with the President it would have been unnecessary to create the Board of Referees, since upon abandonment of this right it could assert its claim under section 3 by suit in the Court of Claims.

If we assume that Congress intended by the creation of this board to vest in it power to adopt some measure of damages other than that prescribed by Congress or in the exercise of an arbitrary and absolute discretion to determine what in its opinion constituted a fair, reasonable or just compensation, the conclusion would seem to be justified that Congress intended to vest in said board powers inherently vested in the courts. While Congress may, of course, establish inferior courts, when established their powers are derived from the constitution and not from the act of Congress. That it was not the intention of Congress to vest or to attempt to vest in this board an arbitrary discretion to determine what was a fair and reasonable compensation is shown by the language of section 3 which provides, *inter alia*, that this board "shall consider all the facts and circumstances and shall report, as soon as practicable in each case to the President the just compensation calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section 1." The agreement author-

ized in section 1 is to pay just compensation equivalent to the railway operating income during the test period. *It is, therefore, clear that the fact to be determined by this board is the amount that represents the just compensation as defined in section 1 and that the board is limited in its discretion to a finding of this fact.*

FAR REACHING EFFECT OF COURT'S DECISION IN INSTANT CASE

It would be difficult to exaggerate the importance of the questions raised on this appeal. The court's construction of the statutes here involved may directly or indirectly affect claims against the United States settled and unsettled involving many millions of dollars. Section 1 of the Federal Control Act, which is the statute directly involved, of necessity must be considered in its relation to other provisions of the Federal Control and Transportation Acts. By these two acts Congress created a machinery (a) for the operation of the transportation systems of the United States during the federal control period; (b) for the return of such systems to their owners and (c) for compensating the owners for the use of their properties and for the resultant effects of government operation.

Under Section 1 of the Federal Control Act carriers operated by the Government during the Federal control period in effect were guaranteed that their net operating income should be equivalent as nearly as may be to their average net operating income for the three year period ended June 30, 1917, described in the act as the "test period". The President was authorized by this act to release from federal operation those carriers, federal operation of which was deemed not needful. Under Section 204 of the Transportation Act certain carriers privately operated during the Federal Control period were guaranteed the same compensation and under Section 209 of the Transportation Act certain carriers privately operated were guaranteed the same return for the six months following the federal control period, described in the statute as the "guaranty period."

The compensation guaranteed to carriers operated by the government during the federal control period is payable by or through the Director General of Railroads. The Compensation payable to carriers privately operated during any part of the Federal control period and during the six months following the Federal control period is payable upon the certificate issued by the Interstate Commerce Commission.

The measure of compensation, according to our understanding of the statutes involved, is the same in each case, i. e., the difference between the net operating income during the test and federal control periods.

In the instant case the Director General as agent for the President has contended that appellant was never under federal control and that any compensation to which it is entitled is payable under Section 204 of the Transportation Act upon the certificate of the Interstate Commerce Commission. (R. p. 6.) While the record in this case does not show that the Interstate Commerce Commission has determined whether this carrier was ever under federal control, the Commission in other similar cases has refused to make settlements under section 204 on the ground that all such carriers (usually referred to as "The Short Lines"), were under Federal control until relinquished by the Director General at the expiration of the first six months of federal control. (Abilene & Southern Ry. v. Interstate Commerce Commission, 53 Wash. Law Rept. 806).

It is thus manifest that if the court in this case should adopt the view of Government's counsel and hold that in order to entitle a carrier to compensation under Section 1 the claimant must show an actual as distinguished from a technical possession, use, control and operation of its railroad by the Government, it would be necessary for this court to define actual as distinguished from technical operation. Its definition may and probably would affect settled as well as unsettled claims against the United States under this section.

Again if the court should sustain the contention of Government's counsel that appellant to be entitled to receive any compensation under section 1 of the Federal Control Act must show that it suffered a loss during the first six months of the Federal control period caused by some act of the Government or the Railroad Administration a very large number of settled and unsettled claims will necessarilly be affected by this court's decision.

If the court concludes that appellant was privately operated

during the first six months of federal control but is entitled to the difference between its net operating income during the test and federal control periods under Section 204 a number of settled and unsettled claims will likewise be affected, since the Interstate Commerce Commission, as we have seen, has held that lines in this class were under federal operation during the first six months of that period. (Abilene & Southern Ry. v. Interstate Commerce Commission supra)

Viewed from any aspect, therefore, it is manifest that the decision in this case of necessity will have far reaching effect and that the principle involved is one of vital importance to the short lines in the United States which according to the report of the Senate Committee heretofore referred to, serve the smaller communities but are dependent largely for their livelihood upon connecting trunk lines.

Respectfully submitted,

CRIPPLE CREEK & COLORADO SPRINGS RAILROAD CO.
By MILTON C. ELLIOTT,
Attorney.

635 Southern Bldg.,
Washington, D. C.

INDEX

	Page
Opinion below	1
Grounds of jurisdiction	1
Statement	1
Argument:	
Summary	12
I. The President did not take possession of appellant's railroad nor did he assume control or operation of it	15
(a) General Orders and Circulars appellant did not receive	24
(b) Cases relied upon by appellant as showing a taking	31
(c) Did Congress, through the Federal Control Act, take appellant's railroad?	37
(d) Congress cannot direct what the decision of the court shall be, or the construction the court shall adopt, in construing an Act of Congress; nor can Congress determine what facts can show a taking of property for public use. These matters are all of a judicial character and in our system of government must be determined by the courts	39
II. If appellant's railroad was taken under Federal Control, such control was merely technical or nominal and does not entitle appellant to compensation on the same basis as an owner who was dispossessed and his railroad actually taken possession of and operated by the government	49
III. Assuming that appellant's railroad was taken under Federal Control as defined by the Federal Control Act, from January 1, 1918 to June 30, 1918, inclusive, the amount of just compensation due it is to be measured by the pecuniary loss suffered by it resulting from such control	59
(a) Pecuniary loss is measured by the value of the use of which the owners were deprived	59
(b) No proof that the value of the use was diminished by Federal Control, and if so, no proof of the pecuniary value of such diminution	61

Argument—Continued.
Summary—Continued.
III. Assuming that appellant's railroad was taken under Federal Control as defined by the Federal Control Act, etc.—Continued. Page
(c) Pecuniary condition of appellant not changed by said control ---- 62
(d) The assumed fair rental value of appellant's railroad for an indeterminate period used by the board as a measure of just compensation was erroneous ---- 63
(e) The amount of just compensation is not to be measured by the amount to which the President was limited in the making of a voluntary agreement under Section 1 of the Federal Control Act ---- 64
(f) The prima facie effect given the finding of the board of referees merely establishes a rebuttable presumption ---- 67
(g) The earnings for a certain prior period should not be used as a basis of comparison with the period of alleged Federal control, unless all conditions of both periods are considered ---- 68
(h) It was error to refuse to consider evidence of actual operating results during period from January 1, 1918, to July 1, 1918 ---- 69
(i) The board of referees adopted an erroneous basis for awarding compensation, considered improper and incompetent evidence and refused to consider competent evidence bearing on appellant's loss, if any, from the alleged taking of its property, and its report is, therefore, without prima facie effect ---- 72
(j) Allowance by board of referees for maintenance and depreciation ---- 77
Conclusion ---- 79

CASES CITED

Bauman v. *Ross*, 167 U. S. 548, 574 ---- 61
Boston Chamber of Commerce v. *Boston*, 217 U. S. 189 ---- 61
Brooks-Scanlon Corp. v. *U. S.*, 265 U. S. 106–123 ---- 74
C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226 ---- 62
Cleveland, etc., Ry. Co. v. *Backus*, 154 U. S. 439, 445 ---- 60
Davidson v. *Payne*, 289 Fed. 69 ---- 25
Des. Moines Gas Co. v. *Des Moines*, 238 U. S. 153 ---- 72
Duckett & Co. v. *United States*, 266 U. S. 149 ---- 31
E. I. DuPont de Nemours & Co. v. *Davis*, 264 U. S. 456 ---- 57, 73

	Page
Houston East & West Texas Rwy. Co. v. *Tanner*, 227 S. W. 713 (Tex.)	25
Knoxville v. *Knoxville Water Co.*, 212 U. S. 15	72
Koshkonong v. *Burton*, 104 U. S. 668–678	46
Marbury v. *Madison*, 1 Cranch 137, 167	42
Meeker v. *Lehigh Valley R. R. Co.*, 236 U. S. 442, 430	67, 76
Monongahela Navigation Co. v. *United States*, 148 U. S. 312–327	47–50, 57, 60
North Carolina R. R. Co. v. *Lee*, 260 U. S. 16	56, 64, 73, 74
Northern Pacific Railway Co. v. *North Dakota*, 254 U. S. 135	31
Omnia Commercial Co. v. *United States*, 261 U. S. 502	36
Pennsylvania Railroad Company v. *Jacoby*, 242 U. S. 89	68, 76
Portsmouth Harbor Land & Hotel Co. v. *U. S.*, 260 U. S. 327	32
San Diego Land & Tea Co. v. *Jasper*, 189 U. S. 439	70
Tanner v. *Canal & Irrigation Co.*, 239 U. S. 323	61
United States v. *Chandler-Dunbar Co.*, 229 U. S. 53–76	61
U. S. v. *Claflin*, 96 U. S. 546–548	44
U. S. v. *New Rivers Collieries Co.*, 262 U. S. 341–3–4	52, 57, 61, 74
U. S. v. *Russel*, 13 Wall. 623	32

STATUTES

An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes, C–418, 39 Stat. 619–645	31–38, 59
Federal Control Act of March 21, 1918, 40 Stat. 451	37

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 315

MARION & RYE VALLEY RAILROAD COMPANY
APPELLANT

v.

THE UNITED STATES, APPELLEE

APPEAL FROM THE COURT OF CLAIMS

BRIEF IN BEHALF OF APPELLEE

OPINION BELOW

The opinion of the Court of Claims (R. 41) is reported in ———, Court of Claims.

JURISDICTION

The grounds of jurisdiction are correctly stated in Appellant's brief.

STATEMENT OF THE CASE

Appellant's statement of the case is subject to minor corrections and substantial additions in the following particulars.

ERRORS IN APPELLANT'S STATEMENT

True length of appellant's railroad is 17.7 miles (R. 38, Finding IX), not 22 miles.

The statement on page (3) of appellant's brief that appellant received traffic from the Virginia & Carolina Railroad, through its connection with the Virginia Southern Railroad, is incorrect. The Virginia Southern Railroad did not connect with the Virginia & Carolina Railroad. They were parallel lines, about 25 miles apart, but by reason of the connection of the Virginia Southern with the appellant's railroad and connection of appellant's railroad with the Norfolk & Western, and the connection of the Virginia & Carolina Railroad with the Norfolk & Western Railroad, the Virginia Southern Railroad and the Virginia Carolina Railroad competed for business in the territory lying between the two lines. (R. 38, Finding X.)

ADDITIONAL STATEMENT

The Director General did not at any time take over the actual possession or operation of appellant's railroad, and did not give at any time any specific directions as to its management or operation, and did not at any time interfere with its conduct or activites in any way. Appellant retained the possession and continued in the operation of its railroad during all of the time in controversy and retained its earnings without accounting therefor, to the government in any way and expended same

as it saw fit, and devoted its net operating income to its own uses. (R. 39, Finding XIII.)

In such finding it is agreed:

> That from December 28, 1917, to July 1, 1918, the plaintiff's railroad had a net income of $1,897.43, which sum it retained for its own use; that during the aforesaid period it did not turn over any of its earnings to the Director General of Railroads, or the United States; that from December 28, 1917, to July 1, 1918, the railroad transported the same character of traffic as it had transported prior thereto; that it did not serve any military camps and did not transport any troops or munitions of war during said period; that during said period there was no change in the manner or method of conducting the operation of said railroad * * * the same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto. It never received any instructions from the Director General of Railroads applying to it individually. The company received no orders with reference to expenditure of money for maintaining its road, and received no instructions as to how it should be operated or maintained other than those heretofore mentioned. No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. The plaintiff from December 28, 1918 (1917), to June 29, 1919 (1918), continued to operate its road exactly as it had always operated it.

While many general orders and general circulars were sent out by the Director General, during the period in controversy, giving minute instruction in reference to the operation and management of the railroads under Federal control, appellant received only those set out in appellant's statement of facts, and in addition General Order No. 14, submitting report of the American Railway Association as to method of complying with the Federal Daylight Savings Law, and General order No. 28, increasing passenger and Freight Rates on railroads under Federal control, neither of which required appellant to make any change in its operation, maintenance, or in any other respect. (R. 43, Opinion Court of Claims.)

Appellant did not receive General Order No. 27, commonly known as the "Wage Order," issued by the Director General of Railroads May 25, 1918, pursuant to which wages of employees on railroads being operated by the Government under Federal control were increased. Such order was not made applicable to appellant's railroad, did not name appellant or its railroad therein, and was not applied on appellant's railroad. (R. 37, Finding VII.)

Appellant did not keep separate books of account during the period in controversy. It closed its books on January 1, 1918, and opened new books on that date in accordance with its usual custom, which was also in harmony with the directions of

the Director General in General Order No. 2 in respect to railroads under Federal control. (R. 38, Finding XI, and R. 32, Finding III.)

In addition to the four general orders received by appellant, there were issued by the Director General, during the period January 1, to July 1, 1918, 27 other general orders, and 38 numbered general circulars. All are published in public document entitled:

UNITED STATES RAILROAD ADMINISTRATION
DIRECTOR GENERAL OF RAILROADS
BULLETIN NO. 4 (Revised)

PUBLIC ACTS
PROCLAMATIONS BY THE PRESIDENT
RELATING TO THE UNITED STATES
RAILROAD ADMINISTRATION
and
GENERAL ORDERS AND CIRCULARS
ISSUED BY THE DIRECTOR GENERAL
OF RAILROADS
to
DECEMBER 31, 1918

For convenient reference we attach in appendix hereto copies of General Orders Nos. 3, 7, 10, 12, 15, 17, 20, 23, 24, 25, 30, and 31, all issued during the time in controversy and giving specific instructions for the operation and management of railroads under Federal control, none of which were furnished appellant, and none of which were complied with by appellant or in any manner affected the operation or management of its railroad.

Appellant's average net annual railway operating income for the three fiscal years ending June

30, 1917 (Test Period), was $23,252.00; one-half thereof being $11,626.00. The actual net railway operating income for the period January 1 to July 1, 1918, was $1,897.43. The tonnage and revenues of appellant were decreasing in volume and amount prior to January 1, 1918. (R. 40.) Lumber mills at Fairwood and Marion, which were operated during the test period, were abandoned towards the end thereof, and line extending from Troutdale to Fairwood had been taken up. (R. 38, 39, Findings X and XI.)

The appellant claims, and the referees allowed appellant as compensation for the alleged use of its property by the Government, during the time in controversy, the difference between the net operating revenue for the period January 1 to July 1, 1918 ($1,897.43), and one-half the average annual net operating income during the three year test period ($11,626.00), which difference amounted to $9,728.57. In addition to such amount, appellant claims, and the referees allowed for alleged depreciation during the period in controversy, the sum of $2,514.87, arriving at such amount by taking one-half of the average annual charge to depreciation by appellant on its books, during the three year test period. The referees did not find there was actual depreciation and no evidence thereof was submitted to the referees. Appellant claimed and referees allowed for undermaintenance of the railroad for the period January 1 to July 1, 1918, $2,182.50, such amount being one-half of the average annual

maintenance charge for the test period as shown by the books of appellant. The items of depreciation and undermaintenance were grouped together by the referees, however, in the allowance made, allowing for the two items the aggregate sum of $4,697.37, the total allowance by the referees for the items of compensation, depreciation, and undermaintenance being $14,425.94. (R. 14, 15, 18, 19, 20, 21, 22, 40, and 41; also opinion, Referees, R. 5.)

In arriving at the amount of compensation to be awarded, the board of referees assumed a relation of landlord and tenant, as between the government and the appellant. In the opinion the referees state:

> The board finds the compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. (R. 12.)

The amount awarded by the referees is based upon the standard return; that is, the average annual net income during the test period, notwithstanding reduced volume of business and increased costs of operation, and reduced net income prior to January 1, 1918. There was no evidence of rental value or of value of appellant's railroad. Such items were ignored, as also the actual operating results during the period in controversy. In the opinion the referees state:

> In our judgment there is insufficient evidence in the record upon which to arrive at

a fair valuation of plaintiff's railroad properties, and we will not, therefore, attempt to consider the percentage return upon the fair valuation in making our finding of just compensation for the use during the said six months' period. There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. In our opinion, evidence of earning power offers the best measure for our finding of the fair rental value of plaintiff's property in the claim under consideration. It appears, furthermore, that the rental value must be taken as of the commencement of Federal control * * *. Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions, and in addition, such as may be foreseen by reasonably intelligent business men, can be given any weight in our conclusions. This is based on justice and sound reasoning because the lessor of a business would have no standing in court to urge a reduction in rental, if the results of his own management show a declining income; and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone. Accordingly our judgment of the rental value of the lease in this case must be based largely upon the evidence before us of plain-

tiff's earning power prior to December 28, 1917. (R. 12 and 13.)

The report of the referees further states:

> Respondent submitted a statement showing the operating income and revenue tonnage of the plaintiff's railroad both prior and subsequent to Federal control. In so far as said statement applies to the period prior to Federal control it is properly given consideration, but not to show traffic conditions after January 1918, or for the purpose of comparison with the six months of 1918, which latter could not have been known at the time when Federal control was instituted, our view being that we must place ourselves in the position of the parties at the time the implied lease was effected. All past and present operations and conditions on December 28, 1917, including matters from which deductions as to future income might be drawn, could under this rule be available for our consideration but not the actual figures of operations subsequent to that date. The country was at war, but what the effect of the war upon the income of the carrier would be was highly problematical. Increased operating expenses were doubtless foreseen, but it might have been expected that freight rates would keep pace with them and a heavy movement of the chief commodities carried by plaintiff for military purposes, resulting in a large net income, might even have been anticipated. (R. 14.)

The Board of Referees also based its finding on the supposition that the Government would continue in possession of appellant's property for a period of years, and arrived at the amount of compensation on such basis, notwithstanding it was known at the time of the hearing, and before opinion of the referees, that the alleged control continued but six months. In the report the referees stated:

> In view of the fact that the duration of Federal control could not be foretold on December 28, 1917, and the lease, therefore, was for an indeterminate period, it is our opinion that the fair rental should be based upon an average of expected earnings for a period of years and not upon the immediate outlook for business for the first six months of 1918. Since plaintiff's operating income for the six years ended June 30, 1917, showed a six months' average of $11,721.92, its claim for compensation based upon the six months' average for the three years ended June 30, 1917, amounting to $11,626.00 (one-half the standard return) is within the six months' average return that might have been expected of the property on December 28, 1917. (R. 14.)

The Court of Claims in its opinion, after reviewing all of the facts, none of which were in dispute, held:

> After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public

> use, the court is of opinion that no taking is shown which comes within the meaning of the Constitution and the law. (R. 44.)

In considering the question of appellant's loss, if any, by reason of the supposed taking of its property, the Court of Claims said:

> There is no proof that it has lost anything thereby. Its property has never been out of its own control. It operated it without let or hindrance by the Government during the entire period for which it is claiming that the Government had possession of it. If any loss was incurred during that time it was the result of the plaintiff's own operation and control of its own property. * * * If the plaintiff did not adequately maintain its property while it was in its own possession and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay for the maintenance of its property?
>
> Other reasons are advanced by the plaintiff, and supported by the board of referees, as to why compensation should be awarded the plaintiff in this case. It is not deemed necessary to recite these reasons, which are not sufficient to combat the plain and uncontradicted evidence that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical con-

> trol of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made. We think that the property of the plaintiff was not taken by the Government. If there was technical control of the property by the government, it was of such a character that it did not cause any loss to the plaintiff, and does not justify the award of any compensation. (R. 44 and 45.)

Appellee contends that the Court of Claims was right in holding and determining that there was no taking of appellant's property entitling it to compensation, and in holding that if appellant's property was technically taken, appellant was not damaged and therefore not entitled to recover.

ARGUMENT

SUMMARY

I. The President did not take possession of the appellant's railroad; nor did he assume control or operation of it.

- (*a*) General Orders and Circulars appellant did not receive.
- (*b*) Cases relied upon by appellant as showing a taking.
- (*c*) Did Congress, through the Federal Control Act, take appellant's railroad?
- (*d*) Congress cannot direct what the decision of the court shall be, or the construction the court shall adopt,

in construing an Act of Congress; nor can Congress determine what facts can show a taking of property for public use. These matters are all of a judicial character and in our system of government must be determined by the courts.

II. If appellant's railroad was taken under Federal control, such control was merely technical or nominal and does not entitle appellant to compensation on the same basis as an owner who was dispossessed and his railroad actually taken possession of and operated by the government.

III. Assuming that appellant's railroad was taken under Federal control as defined by the Federal Control Act, from January 1, 1918, to June 30, 1918, inclusive, the amount of just compensation due it is to be measured by the pecuniary loss suffered by it resulting from such control.

(*a*) Pecuniary loss is measured by the value of the use of which the owners were deprived.

(*b*) No proof that the value of the use was diminished by Federal control, and if so, no proof of the pecuniary value of such diminution.

(*c*) Pecuniary condition of appellant not changed by said control.

(*d*) The assumed fair rental value of appellant's railroad for an indeterminate period used by the board as

74996—25——2

a measure of just compensation was erroneous.

(*e*) The amount of just compensation is not to be measured by the amount to which the President was limited in the making of a voluntary agreement under Section 1 of the Federal Control Act.

(*f*) The prima facie effect given the finding of the board of referees merely establishes a rebuttable presumption.

(*g*) The earnings for a certain prior period should not be used as a basis of comparison with the period of alleged Federal control, unless all conditions of both periods are considered.

(*h*) It was error to refuse to consider evidence of actual operating results during period from January 1, 1918, to July 1, 1918.

(*i*) The board of referees adopted an erroneous basis for awarding compensation, considered improper and incompetent evidence and refused to consider competent evidence bearing on appellant's loss, if any, from the alleged taking of its property, and its report is, therefore, without prima facie effect.

(*j*) Allowance by board of referees for maintenance and depreciation.

I

The President did not take possession of appellant's railroad; nor did he assume control or operation thereof

The foregoing proposition must be determined from the facts found by the Court of Claims, the just inferences to be drawn therefrom, and such other facts as are judicially known to the Court.

The appellee contends the appellant's railroad was not taken possession of by the President, and was not used or operated by him, but, on the contrary, remained at all times in the possession and use of the appellant and was operated by appellant in accordance with its own judgment and discretion, and the appellant received and retained all the revenues derived from such operation and devoted same to its own uses.

On the question of whether appellant's railroad was taken possession of and operated by the President, the burden of proof is on the appellant. Appellant is asserting a right against the government, and must prove the essential elements of its cause of action. It is not for the government to disprove same. The Court of Claims has found the facts and has drawn the just inference therefrom and has found and determined that appellant's railroad was not taken under Federal control. In the court's opinion it is said:

> After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public

> use, the Court is of opinion that no taking is shown, which comes within the meaning of the Constitution and the law. (R. 44.)

Appellant must, we think, before being entitled to a reversal of the judgment of the Court of Claims, show that the facts as found by the Court, and the just inferences to be drawn therefrom, establish affirmatively a taking of its property by the President. Appellant relies on the Proclamation of the President, issued December 26, 1917, and upon the receipt by it of four general orders and two unnumbered circulars, issued by the Director General of Railroads, none of which specifically apply to appellant's railroad and neither of which require any act of commission or omission on the part of appellant, or constitute any invasion of its rights or interference with its property, or the operation or use thereof. The Proclamation of the President was very broad in its terms, as was probably necessary under the circumstances presented; but such proclamation did not of itself constitute a taking of appellant's property. The proclamation did not purport to take possession of any system of transportation *in praesenti,* but rather constituted an announcement of a purpose to take possession of a very large number of systems of transportation in the future—a purpose that might or might not be fulfilled. The proclamation was issued December 26th, 1917, and while using words of present import, announced the tak-

ing possession of certain systems of transportation in the future; to-wit, "at 12 o'clock noon, December 28, 1917"—two days thereafter.

We need not argue that the President did not *on December 26,* take possession of the railroads *two days thereafter.* The event could not, by the use of language or otherwise, be projected into the future. The proclamation was, therefore, but an announcement of a purpose or intention to take possession of certain systems of transportation two days subsequent to such announcement; an intention that might be carried out as to some and abandoned as to others. If the President had done nothing more than issue the proclamation, he would be a bold advocate who would contend that any system of transportation had been taken possession of by the President. This is the view of the Court of Claims as expressed in its opinion in this case. The Court says:

> The proclamation by itself did not constitute a taking. If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of the property. The contention of the plaintiff that its property was taken by virtue alone of the proclamation of the President cannot be sustained. (R. 43.)

Something further was necessary, but doubtless when such further necessary act was per-

formed, the possession might relate back to the time named in the proclamation. To crystallize into possession of any particular system of transportation, such further act must be with reference to such particular system. What further action have we in reference to plaintiff's railroad?

Appellant relies on General Orders 1, 2, 14, and 28, as additional acts showing the taking possession of its railroad by the President.

General Order No. 1 is dated December 29, 1917, and is addressed "To all concerned." It recites:

> Pursuant to the Act of the President of the United States, through the Secretary of War, the *undersigned* has taken possession and assumed control of *certain* transportation systems described in the Proclamation of the President. (Italics ours.)

It will be noted that the order advises that William G. McAdoo, *Director General,* has taken possession of certain systems of transportation, pursuant to the proclamation of the President, rather than that the *President,* through such proclamation had taken possession. It will also be noted that the order advises that possession had been taken of *certain* transportation systems described in the proclamation—not that *all* transportation systems had been taken possession of. Between the time of the issuing of the proclamation, and receipt of copy of General Order No. 1, there had been no action taken with reference to appellant's railroad. The general order was in relation

to what the *Director General* had done; that is, the taking possession of *certain* railroads, of which "officers, agents, and employees of *said* transportation systems are to take immediate notice." The order contains some general instructions, which could apply only to those transportation systems the Director General had taken over, and to the employees thereof, but could not apply to the appellant, as, up to that time, there had been no act by the Director General with respect to its railroad. The general order did not purport to take possession of any railroad, but did advise that the Director General *had* taken possession and assumed control of certain transportation systems described in the proclamation. The order was dated December 29, 1917, and deals with a *completed* act, not a *contemplated* one. Sending a copy thereof to the appellant, not addressed to it or to any of its officers, did not amount to the taking possession of appellant's property, and did not invade any of its rights, did not interfere with its possession or right to operate and use its railroad, and did not indicate an intention or desire on the part of the Director General to "take possession" or "assume control" of appellant's railroad. The order does not contain any instructions or directions, which, if followed by appellant, would involve any change or modification in its use or operation of its railroad. Upon receiving copy of the order, the managing director of appellant having "some doubt

as to whether his road was was intended to be taken under Federal control," wired the Director General inquiring whether the road was under Federal control, and if he should observe the order. He received a reply from the Director General directing him " to obey the order." It is noted that he was not advised that the road was under Federal control. (R. 36, Finding V.)

A copy of General Order No. 2, addressed " To the Chief Executives of the Railroads," and dated December 29, 1917, was received by appellant. Such order provided that—

> Until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required.

and that the accounts shall be closed as of December 31, 1917, and opened as of January 1, 1918—

> in the same manner as heretofore handled at the close of one fiscal year and the beginning of another, and in the same manner that you should have handled your accounts had the Government not taken possession and control. (R. 32.)

Appellant received copy of a circular dated January 8, 1918, issued by the Director General, addressed " To all Railroad Officers and Employees," and urging the necessity for patriotic service in the operation of the railroads as a means of successful prosecution of the war. Such circular closed with the following:

> I am giving careful consideration to the problems of railroad employees and every effort will be made to deal with these problems justly and fairly at the earliest possible moment. (R. 33.)

If the Director General regarded the appellant's railroad as being under Federal control, he violated this assurance in issuing General Order No. 27, increasing wages of railroad employees, for same was not made applicable to appellant's railroad, and its railroad was not named or mentioned therein. (R. 27, Finding VII.)

Appellant received a copy of a letter dated January 18, 1918, addressed to L. A. Ambler, General Manager, Virginia Southern Railroad Company, signed by William G. McAdoo, Director General, urging all railroads to cooperate with the Fuel Administration in accumulating and distributing an ample fuel supply. (R. 34.)

Appellant received copy of General Order No. 14, dated March 25, 1918, containing instructions in reference to compliance with the Federal law " to save daylight and to provide standard time for the United States." (R. 34.)

Notice of the regulations thus put into effect was important to all having relations with the railroads under Federal control, and especially carriers not under Federal control, having connections and interchange of traffic with Federal control railroads.

Appellant also received a copy of General Order 28, dated May 25, 1918, and providing for an increase in freight and passenger rates on railroads under Federal control, effective June 10, 1918, as to passenger rates, and June 23, 1918, as to freight rates. (R. 35.)

This order was not specifically applicable to appellant's railroad and appellant did not understand it so to be, and after its issuance, and in June, 1918, appellant was urging the Virginia Corporation Commission to grant an increase in its transportation charges. (R. 36, Findings V and VI.)

The Commission declined to act, believing appellant's railroad was under Federal control, whereupon appellant went to the Interstate Commerce Commission, and later to the Railroad Administration, and was authorized by both to put into effect on appellant's railroad, the increased rates authorized in General Order 28. (R. 36, Findings V and VI.)

It will be noted, however, that appellant put the increased rates into effect and the Director General did not. Under Section 10 of the Federal Control Act, the Director General could only put rates into effect by filing same with the Interstate Commerce Commission. This he did not do in respect to appellant's railroad. Such action, in authorizing appellant to put such increased rates into effect, was not, we think, an assumption of possession, or control, but rather the Di-

rector General, in conjunction with the Interstate Commerce Commission, acquiesced in such action by the appellant—an acquiescence probably resulting from the refusal of the Virginia Corporation Commission to assume jurisdiction, and a conviction that appellant's transportation business required an increase in its rates, and that if neither the Interstate Commerce Commission, nor the Director General objected, in view of the attitude of the Virginia Corporation Commission, appellant would not be interfered with in applying such increased rates.

The foregoing are the only orders, circulars, communications or other acts of the Railroad Administration coming to appellant's knowledge, or that could in any way affect appellant or its property, with the exception of the alleged order of relinquishment, dated June 24, 1918, addressed to T. S. Ambler, General Manager, Marion & Rye Valley Railway Company, and signed by John Barton Payne, the then General Counsel of the United States Railroad Administration. Same recites:

> DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question, this order is issued definitely relinquishing same. (R. 37, Finding VIII.)

The language of the order of relinquishment shows that the chief law officer of the Railroad Ad-

ministration did not regard appellant's railroad as being under Federal control. The conduct of appellant, in going before the Virginia Corporation Commission, to procure an increase in rates in June, 1918, shows that appellant did not at that time regard its railroad as being under Federal control. The appellant received no instructions as to how it should operate its property, or how it should maintain it, or how it should spend its money, or what disposition should be made thereof at any time.

> The same officials operated the road, from December 28, 1917, to July 1, 1918, as had operated it prior thereto. It never received any instructions from the Director General of Railroads applying to it individually. The company received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained, other than those heretofore mentioned. No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. Plaintiff from December 28, 1918 (1917) to June 20, 1919 (1918), continued to operate its road exactly as it had always operated it. (R. 39 and 40, Finding XIII.)

(a) General orders and circulars appellant did not receive

Prior to June 24, 1918, there were issued by the Director General thirty-two general orders and thirty-eight numbered general circulars, many of

which give important and detailed instructions in reference to the management, operation, accounting and conduct of the railroads under Federal control, none of which were sent to, or received by appellant, except only those already specifically referred to. As illustrative, and for ready reference, we have attached in appendix hereto, copies of general orders hereinafter specifically referred to. We think same can be considered as bearing upon the intention and understanding of the Government as to the status of appellant's railroad during the time in controversy, and on the question of whether appellant's railroad was taken by the Goverment, since the Court will take judicial notice of such general orders and their contents. (*Davidson* v. *Payne,* 289 Fed. 69; *Houston East & West Texas Railway* v. *Tanner,* 227 S. W. 713, Tex.)

General Order No. 3 (Appendix, p. 87), dated January 5, 1918, was a very important order changing demurrage rules and increasing tariff charges on Federal Control railroads, but appellant did not receive a copy and did not comply therewith.

General Order No. 7 (Appendix, p. 88), dated January 29, 1918, provided for sweeping changes in demurrage regulations, and required cancellation of all conflicting provisions, but appellant did not receive a copy or comply with it.

General Order No. 10 (Appendix, p. 90), dated March 14, 1918, required carriers under Federal

control to make an inventory of supplies on hand as of December 31, 1917, and required same to be completed by May 1, 1918, but appellant did not receive a copy and did not make an inventory. The purpose of this order was to furnish a basis for settlement with carriers under Federal control, for materials and supplies taken over by the Government.

General Order No. 12 (Appendix, p. 91) contained minute instructions with regard to all railroad expenditures chargeable to capital account. This was important in making final settlement with carriers under Federal control, but appellant did not receive or comply with it.

General Order No. 15 (Appendix, p. 94), dated March 26, 1918, contained definite instructions in reference to installing new, and maintaining old industry tracks, placing the expense thereof largely on the industry, instead of carrier as theretofore, but appellant did not receive or comply with it.

General Order No. 17 (Appendix, p. 95), dated April 3, 1918, contains very detailed directions in reference to accounting for transactions arising during Federal control, but appellant did not receive or comply with it.

General Order No. 20 (Appendix p. 100), dated April 22, 1918, directed the discontinuance of technical and arithmetical checking of bills and statements covering interline matters as between carriers under Federal control. Such checking be-

came of little importance since errors as between carriers under Federal control did not involve any loss to the government. Any over or under payment as between carriers was merely an over or under payment of the government to itself. In such view such checking was a needless expense. To discontinue such checking of bills of non-federal carriers would be indefensible and it is significant that appellant did not receive the order.

General Order No. 23 (Appendix, p. 101), dated May 2, 1918, provided:

> Each and every carrier under Federal control shall render a weekly cash report upon Form T-5, as per copy herewith. The first report shall be rendered as of May 4, 1918.

This order was not sent to appellant and it made no such reports.

General Order No. 24 (Appendix, p. 101), dated May 16, 1918, directed carriers under Federal control to renew no fire insurance on their properties, but appellant did not receive or comply with it.

General Order No. 25 (Appendix, p. 102), dated May 20, 1918, required the business of carriers under Federal control to be conducted on a cash basis and forbade extending of credit to shippers except in cases where bonds were given, but appellant did not receive it.

General Order No. 27, dated May 25, 1918, provided for an increase in wages of railroad employees generally on railroads under Federal con-

trol, but was not made applicable to appellant's railroad, and was not applied thereon. (R. 37, Finding VII.)

General Order No. 30 (Appendix, p. 105), dated June 12, 1918, contains minute instructions for settlement of inter-road bills and accounts " rendered by one carrier under Federal control against or on account of another carrier under Federal control," and expressly provided that regulations therein should not apply to " settlement of accounts between a carrier under Federal control and a carrier not under such control." It is significant that this order was not sent to appellant. It is also significant that this and other orders referred to recognizes the existence of connecting carriers with whom interline and inter-road accounts and bills were developed, which were not under Federal control.

General Order No. 31 (Appendix, p. 108), dated June 12, 1918, promulgated rules and regulations covering accounting for use of equipment and facilities of one carrier under Federal control by or on account of another carrier under Federal control. Appellant did not receive this order.

On May 21, 1918, the Director General issued an order, published in Public Document, Bulletin No. 4 (Revised), hereinbefore referred to, page 113, copy at Appendix (p. 111), providing for the appointment of Federal Managers for railroads under Federal control, establishing additional regions for

operation, and appointing additional regional directors. Such order provides in part:

> In view of the direct responsibility for the operation of the railroads of the country, placed upon Director General McAdoo, by the Act of Congress, and by the proclamation of the President, he has been unable to escape the conclusion that it will be advisable to place in direct charge of each property, for operating purposes, a representative to be known as the Federal Manager, who will report to the Regional Director. As far as practicable this Federal Manager will be chosen from the operating officers of the particular property, who are therefore entirely familiar with its employees and with its conditions. * * * In the development of this policy, the Regional Directors and also the Federal Managers will be required to sever their official relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.

No Federal manager was appointed for appellant's railroad; no officer of appellant severed his relations with the company, or became an "exclusive" representative of the Railroad Administration. On the contrary, appellant continued in the possession, operation, and use of its railroad "without let or hindrance by the government during the entire period for which it is claiming that

the government had possession of it." (Opinion, Court of Claims, R. 44.)

The failure to furnish the appellant with the foregoing general orders, covering in detail many essential features of the operation, accounting and management of the railroads under Federal control; and the failure to appoint a Federal Manager for appellant's railroad, is, to our minds, far more significant on the question of whether appellant's property was taken by the Government, than is the fact that appellant was furnished copies of four orders, which did not in any way affect its conduct or the operation of its road. The only orders issued by the Director General, which could have affected the appellant in the operation or management of its road, were not furnished to it. It received only four orders, which did not in any way affect it.

Failure to furnish these important orders, and failure to appoint a Federal Manager, cannot be regarded as inadvertent. If the road was regarded as under Federal control, failure to furnish such orders was inconceivable neglect. If they were proper to be observed by railroads being operated by a Federal Manager, selected by the Director General, and required to sever relations with the owning company, their observance was much more important when the conduct and operation of the road was left in charge of the owner whose interests were, in many respects, adverse to the Government.

(b) Cases relied upon by appellant as showing a taking

The cases relied upon by appellant do not justify its contention. In *Northern Pacific Railway Company* v. *North Dakota,* 254 U. S. 135, the taking for public use was not questioned. A Federal Manager had been appointed and was in possession of the railroad. The railway company had been entirely dispossessed and excluded from its property. Question involved was the power of the President, under the Federal Control Act, to prescribe rates, intra and inter state, for transportation on the railroad in the government's possession.

In *Duckett & Co.* v. *United States,* 266 U. S. 149, docks and warehouses belonging to and a part of a system of transportation owned by Bush Terminal Company in Brooklyn, were taken by the President, through the Secretary of War, under authority of the Act of August 29, 1916, C. 418, 39 Stat. 619–645, being the same statute, pursuant to which the President took possession of the railroads. To accomplish the taking, the President, through the Secretary of War, issued a general order dated December 31, 1917, specifically describing the property to be taken, and advising that same was taken for public use, which was served on the Bush Terminal Company on January 3, 1918, and on the Receiver of Duckett & Co., a lessee in possession of a part of the property taken. The notice advised that the property had

been requisitioned for the use of the embarkation service of the United States Army, and those in possession were required to vacate same. A conference between the representatives of the United States and the occupants and owners followed, and as a result the United States took possession on January 31, 1918. This was held to be a taking. It is the failure to do affirmative acts equivalent to what was done in the *Duckett case,* which differentiates the *Duckett case* from the case at bar.

In *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327, the Court held there was a taking because the demurrer admitted the allegations of the petition, which charged that the Government had installed a battery, so located as to permit of discharging projectiles over plaintiff's land; that the Government had done so on several occasions, and intended to continue to do so when it saw fit, and that the imposition of such servitude deprived the owner of profitable use of the property.

In *United States* v. *Russel,* 13 Wall 623, owners of a vessel were instructed by military officer having authority in the premises, that—

> imperative military necessity requires that you make no arrangement for private freight, without first consulting this office, and obtaining permission in writing so to do.

While the vessel remained in the possession of its owners, they were forbidden to use it for their purposes. They were obliged to hold the vessel out of service awaiting the Government's pleasure. They could make no use of it without express permission of the Government. It is clear the vessel was taken for public use during the time the owners were deprived from using it, but the facts showing the taking of the vessel are entirely wanting in the case at bar to show a taking of appellant's property. Appellant remained in possession and in undisputed use and enjoyment of its railroad, collected the same charges, transported the same traffic for its regular patrons to the full extent offered, and received the earnings and disposed of same as it saw fit. Nothing done by the Government caused any diminution of appellant's traffic or earnings, or affected its operation. Surely the *Russel case* does not aid appellant.

All of the cases relied on by appellant are in harmony with the doctrine announced by the Court of Claims in its opinion in this case, which is:

> It is not always necessary that in order to constitute a taking, the property should be absolutely taken. If there is a serious interruption to the common and necessary use of the property, such interruption may be equivalent to the taking of it; but there must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as

to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken.

These principles are particularly applicable in cases where the alleged taking is for the use of the property for a time, and not the taking of the title. There can be no taking of private property for public use, unless there is possession and use thereof for public purposes, evidenced by some act which deprives the owner of the use, possession, control, and operation of his property. A mere declaration of an intention to take can not constitute a taking. The proclamation of the President setting forth that on some future date he will take over the property of certain owners, does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property that the owner is deprived of or circumscribed in some way in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished, it can not be said that there is a taking within the meaning of the Constitution. (R. 42.)

Surely the foregoing doctrine is sound and was correctly applied to the facts of this case by the

Court of Claims, in holding that appellant's railroad had not been taken. The appellant was not deprived of possession; it was not interfered with in operation; it was not circumscribed in the use; its revenues derived therefrom were not diminshed; its expenses of operation were not increased. On the contrary, its own officials continued in possession and operated same without any instructions or directions from the Government. They received and expended the revenues as they saw fit and retained the net income for appellant's use. They operated and maintained the railroad in accordance with their own judgment and discretion. Appellant during the time in controversy, "continued to operate its road exactly as it had always operated it." (R. 39 and 49.)

It may be the President's proclamation and General Order No. 1 created in appellant a doubt as to the status of its railroad—a hope that it was taken or a fear that it was not taken. It is not unlikely that the President's proclamation indirectly caused the proceedings before committees of Congress, referred to in appellant's brief (pp. 25 to 29), which resulted in provision in the Federal Control Act to be hereafter discussed, and which appellant contends aids in establishing the taking of its railroad. It may be the President's proclamation, on account of the general description of the properties to be taken, created some uncertainty, which may have caused some embarrassment to appellant, but such

uncertainty or embarrassment did not constitute such an interference with appellant or its railroad as would constitute a taking. Not every direct interference with property, or the use thereof, will constitute a taking for public use. In carrying out its lawful purpose, the Government oftentimes directly interferes with property of the citizen and with the rights of the citizen, causing serious loss or destruction of property, and yet there is no taking for public use. It is probable the taking of other railroads, following the President's proclamation, was a much more serious embarrassment to appellant in the operation of its own railroad than any direct effect of the proclamation on appellant's railroad, or its operation; but the Government in interfering with the operation of appellant's railroad by the taking and operating of other railroads, did not thereby take the appellant's railroad, and did not thereby become liable to appellant as for a taking or on any other theory. The Government is not liable for consequential damages to the owners of property, resulting from the taking of other property. This question is fully considered in the recent case of *Omnia Commercial Company* v. *United States,* 261 U. S. 502, 67 L. Ed. 773, where the Government, by requisitioning the entire product of a steel mill, for the year 1918, deprived the plaintiff of the benefits of a contract with the Steel Company, which would have been very profitable to the plaintiff had the

Steel Company not been deprived of the power to carry it out, by reason of the action of the Government in requisitioning his entire product.

We conclude that neither the President, by his proclamation, nor the Director General, by any act thereafter, took appellant's railroad, within the meaning of the Constitution or the law, and unless Congress accomplished a taking through the Federal Control Act, there was no taking of appellant's railroad.

The effect of the Act of Congress in enacting the Federal Control Act will now be considered.

(c) Did Congress, through the Federal Control Act, take appellant's railroad?

Section 1 of the Federal Control Act of March 21, 1918 (40 Stat. 451), set out in full in Appendix, page 82, contains the following:

> That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act.

Appellant's railroad is of the character described, since it was engaged in general transpor-

tation, was not owned, controlled or operated by another carrier company and connected with the Norfolk & Western, a railroad under Federal control. In Appellant's brief (pp. 25 to 29) it is shown that representatives of such railroads urged upon Congress the inclusion of such provision in the Transportation Act. The only occasion for its inclusion was the conviction that either the President had not taken such railroads, or the question of a taking was in doubt. By such provision Congress undertook either to take such railroads or to determine that same had already been taken by the President. If the provision constituted a taking, such taking was as of March 21, 1918, and compensation for the taking should be limited to the period thereafter and up to time of relinquishment. Since the language of the provision does not purport to be a taking, and since there appears to be no purpose to assume the power reposed in the President to determine what railroads should be taken to aid in the prosecution of the war, in Section 1, of the Act of August 29, 1916, entitled—

> An Act making appropriation for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes (39 Stat. 645),

we conclude the purpose of the provision was to set at rest the question of whether such railroads had been taken by the President pursuant to his proclamation of December 26, 1917. Congress did not, however, have jurisdiction to determine such

question. This Government is one of divided powers. It is the province of Congress to legislate, and the Executive to execute the powers conferred by Congress, and it is the province of the Court to determine what the law is, and to determine the facts to which the law is applicable, and the resultant rights of the parties under the law and facts.

(d) Congress can not direct what the decision of the court shall be or the construction the court shall adopt in construing an act of Congress; nor can Congress determine what facts will show a taking of property for public use. These matters are all of a judicial character and in our system of government must be determined by the Courts

The provision of the Federal Control Act, above quoted, describes certain classes of railroads, and then provides that such railroads, "shall be held and considered as within Federal control, etc."

This language is, in terms, a direction to coordinate branches of the Government to treat such railroads as if they had been taken by the Government, whether they had been so taken or not; or else it is an instruction to treat the facts bearing upon the question of whether such roads had been taken, as conclusive that they had, in fact, been taken by the Government. It must be remembered that the Act of Congress under which the railroads were taken possession of by the Government, left it to the discretion of the President as to which, if any of them, he should take. The taking, if at all, was an act of the President. The law could not become operative in respect to a particular road until

the President exercised his discretion and power to take it. Unless he exercised such power and took possession of a road, it was not taken. The Federal Control Act was not enacted until nearly three months after the act of taking by the President was an accomplished fact. The Federal Control Act begins with the recital:

> The President, having in time of war taken over the possession, use, control and operation * * * of certain railroads and systems of transportation * * * is hereby authorized to agree with and to guarantee to any such carrier * * * that during the period of such Federal control, it shall receive as just compensation an annual sum, etc.

If the proclamation of the President, and things thereafter done by his representatives, constituted the taking of such railroads, there was no occasion for the provision quoted. If they were of the roads described in the beginning of Section 1, of the Act, there was no occasion for special legislation in reference to them. It must be, therefore, that neither those interested in such railroads, who urged such enactment upon Congress, nor the Congress which enacted the measure, understood or believed that such railroads had been taken by the Government. At least, it is apparent there was a controversy in which the representatives of such railroads were urging that such roads had been or should be taken, and that representatives of the President

were insisting upon the contrary. The language used would indicate a purpose to give to the acts of the President a significance they would not otherwise have. To dispose of the question of the taking of such railroads, Congress did not undertake, by its legislation, to take possession of such railroads in behalf of the Government, but undertook to do so by directing the executive and judicial department of the Government to regard what had been done as accomplishing the taking thereof, whether legally sufficient therefor or not. The fiat of Congress that the property is to be regarded as under Federal control, notwithstanding there had been no taking, would not bring the property under Federal control, and would not protect the executive from being a trespasser if he undertook, without consent of the owner, to treat the property that had not been taken, as though it had, in fact, been taken by the Government. Suppose the owner did not desire that his property should be taken, and the acts of the President prior to the legislation in question did not constitute a taking. In such situation the Government could still lawfully take his property, but the taking would not relate back prior to the doing of the acts which constitute a taking. Applying such thought to the appellant's railroad, if it had not been taken prior to the enactment of the Federal Control Act, the owner would not be entitled to compensation for its use before the taking; nor would the Government

be entitled to receive the earnings, or be liable for operating expenses prior to the taking. The award of the referees in this case is not based on the thought that the provision in question constituted a taking, for it has attempted to allow compensation and charge the Government with operating expenses, maintenance, depreciation, etc., from January 1, 1918. That the board of referees did not regard the act as constituting a taking is shown in its opinion, where it is stated:

> Furthermore, the board considers that paragraph 7 of Section 1 confirms a Federal control already established by the President's proclamation and does not regard it as an original taking of control. (R. 8 and 9.)

In such view the question is squarely presented as to whether Congressional enactment can take the place of definite acts by the President, to whom was entrusted the discretion of determining what railroads should be taken and the doing of the necessary acts to take them. Whether such railroads were taken must be determined by the court. The fact of a taking cannot be decreed or determined by Congress. The thought involved is considered in the celebrated case of *Marbury* v. *Madison,* 1 Cranch 137–167, which involved the question of appointment of a notary public. In discussing the power and duty of the court to determine questions of fact, Chief Justice Marshal used the following language:

The power of nominating to the Senate, and the power of appointing the person nominated, are political powers to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If by law the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed can not be made never to have existed, the appointment can not be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by law, and are not resumable by the President. They can not be extinguished by Executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is

> equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

In the case at bar we say the acts of the President and his representatives, which do not amount to a taking, cannot be decreed by Congress to constitute a taking. Facts which do not exist, cannot be decreed to have existed, any more than "a fact which has existed cannot be made never to have existed." Whether appellant's railroad was taken is a question of fact. The determination of such question is necessary exercise of judicial authority, to the same extent as the question of whether a right has vested. Judicial authority for the determination of such questions is vested solely in the courts. This is true, both from the standpoint of the owner of property and from the standpoint of the government. That Congress cannot by its enactment determine what the law has been, as distinguished from what the law should be in the future, is illustrated in *United States* v. *Claflin*, 96 U. S. 546–548. On enacting revised statutes in 1874, Congress provided:

> All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or

> superseded by subsequent acts, or not being general or permanent in their nature.

A part of an Act of 1823 was carried into the revised statutes and a portion was not, and it was contended that the portion omitted was, by reason of the foregoing language, repealed. In denying such contention, the Court said:

> But that clause indicates a belief on the part of Congress that it had been previously repealed, and doubtless that it was repealed by the act of 1866. The indication is found in the words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is not in the form of an enactment. It is not a declaration of Congressional will. It is not a rule for the future. * * * Whether a statute was repealed by a later one is a judicial, not a legislative question. And even a declaratory act, or an act directing how a former act shall be construed, is inoperative on the past, though controlling in the future.

The question of whether the Act had been repealed was a question of fact to be determined by the Court, and Congress could not, by stating that it had been repealed, accomplish such result or affect the action of the court therein.

74996—25——4

In *Koshkonong* v. *Burton*, 104 U. S. 668–678, is a well considered discussion of the question involved. A legislative enactment assumed to declare what was the true intent and meaning of previous legislation. In holding that it was the province of the court to determine such meaning, the court said:

> When counsel in *Ogden* v. *Bladkledge*, 2 Cranch 272, 277, announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative powers shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point. Prior to the passage of the act of 1868 the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the Act of 1868, that declaration was accompanied by a distinct provision, in terms changing the pre-existing law.

The same thought is involved in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312–327. Congress undertook to say that certain matters should not be considered in arriving at the value of a dam which was being taken for public use, by authority of Congress. The court said:

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

If the matters involved in the foregoing cases were for the determination of the courts, and beyond the power of Congress, we think there can be no doubt that the question of whether appellant's railroad was taken must be determined by the court upon the testimony showing what was done by the President and his representatives. The President has persistently contended that the rail-

road was not taken. The controversy is peculiarly one for judicial determination. Congress being without judicial power could not determine such question. Since Congress evidently did not, by such enactment, assume to take possession of appellant's railroad, and appellant's claim for compensation for the entire period January 1 to July 1, 1918, is inconsistent with the idea that its railroad was taken by Congress in enacting the Federal Control Act on March 21, 1918, we must assume that what Congress attempted was to instruct the executive and the judiciary to treat the acts of the President and his representatives as a taking of all railroads of the character described. This was, we think, beyond the power of Congress. Having reposed in the President a discretion as to what railroads should be taken, it could not declare that he so exercised his discretion as to take a railroad if, in fact, the railroad had not been taken by him. Congress could not instruct the Court to decide that the railroad had been taken, when, in fact, it had not been taken. A decision of the Court, based upon such instruction, would be a denial of due process of law to the owner, and would be a usurpation of the function of the courts, which in our system of government are made independent of the legislature and bound by the Constitution to exercise free and untrammelled the functions bestowed upon them. Instead of aiding the appellant, this provision rather establishes that the President, the representatives of such rail-

roads, and Congress, were of opinion these railroads had not been taken and that legislation was necessary to bring about a determination that they had been taken; otherwise why the enactment of the provision?

We think, therefore, the Court of Claims rightly held appellant's railroad had not been taken for public use and that appellant was not entitled to compensation.

II

If appellant's railroad was taken under Federal control, such control was merely technical, or nominal, and does not entitle appellant to compensation on the same basis as an owner who was dispossessed and its railroad actually taken possession of and operated by the Government

The facts in reference to appellant's railroad have been fully discussed in preceding division of our argument, and we refrain from repetition. If there was a taking of appellant's railroad, same was constructive only and did not involve an actual invasion of appellant's possession. If the Government can be said to have operated appellant's railroad, it did so only constructively through the appellant; not on the Government's judgment, but on appellant's, " without let or hindrance by the Government," to use the language of the Court of Claims. (R. 44.)

Under such circumstances, we inquire, What principle of law or justice requires the Government to place appellant in a better position than it would

have occupied if the things done by the Government had not been done? The usual measure of compensation for taking private property for public use is the value of the thing taken. This is the rule, we think, whether the thing taken is the property itself, or a mere temporary use thereof. "The value of the property, generally speaking, is determined by the productiveness—the profits which its use brings to the owner." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312–328. The foregoing is in reference to permanent taking of property. Such doctrine is equally true when only the temporary use of the property is taken. At most the Government took only the temporary use of appellant's railroad, and the utmost compensation that should be awarded is the value of such temporary use. In the language of the *Monongahela case,* such value is "the profits which the use brings to the owner." Appellant, however, has already had such profits. This is true even though it be conceded that appellant was operating the railroad for the Government. Appellant received all the revenues accruing from its use. The same kind and volume of traffic was transported as would have been transported had the Government not intervened. The same rates were charged and the same operating expenses incurred, and presumably the same maintenance expenditures. There is no basis upon which it can be claimed that the net income, which appellant retained and still has, was

or could have been greater if none of the things charged against the Government had been done. Appellant has therefore received the "profits which its use" would have brought if the President's proclamation had not been issued. The only thing which by any process of reasoning can be attributed to the Government, and which affected the earnings during the period in controversy, is the applying of the rates for transportation prescribed in General Order No. 28, for a few days before July 1, 1918. Since the rates were thereby increased, and authority to apply same was requested by appellant, it cannot claim any loss in profits on such account. If it be suggested that but for the President's proclamation it would have increased its rates sooner, we say there is no evidence or finding of fact to support such a claim, and it appears that appellant, on its own volition, made application to the Virginia Corporation Commission for such authority in June, 1918, shortly before the alleged order of relinquishment was issued, indicating that the proclamation was not up to that time regarded by appellant as depriving it of the power to increase its rates, which it theretofore possessed. There was no application to increase rates pending on January 1, 1918, so far as disclosed, and if an application had been made at that time, in the absence of the President's proclamation, there is no assurance that it would have been acted on before July 1, 1918, or if acted on, there would have been

an increase in rates that would have permitted of net earnings equal in amount to those of the test period—the basis of the referees' award and of appellant's claim.

The measure of compensation in cases of a taking for public use is very aptly presented in *United States* v. *New Rivers Collieries,* 262 U. S. 341–3–4, as follows:

> The owner was entitled to the full money equivalent of the property taken and thereby to be put in as good a condition pecuniarily as it would have occupied if its property had not been taken * * * more would be unjust to the United States, and less would deny the owner what he is entitled to.

The evidence in this case demonstrates that appellant was at the end of alleged Federal control of its railroad, ever since has been, and is now in "as good condition pecuniarily as it would have occupied if the property had not been taken." If allowed further compensation, such allowance will place appellant in a better position than it would have occupied and will be unjust to the Government.

The board of referees allowed compensation on the basis of appellant's alleged net earnings for 6 months during the test period when the railroads of the country were unusually prosperous. Appellant's business had substantially decreased before January 1, 1918, as compared with the test

period. (R. 38, Finding X, R. 39, Finding XII, R. 40, Finding XIV.)

The board of referees, as shown by their report, did not undertake to ascertain what, if anything, appellant lost by the alleged acts of the government. It did not attempt to ascertain the "profits" which the use of the property would have brought to the owner, except for the acts of the Government. It did not attempt to ascertain the money equivalent "of the thing of which the appellant was deprived"; nor did it attempt to ascertain the amount, in money, required to place appellant in "as good condition pecuniarily as it would have occupied," except for the acts of the Government; but the board did attempt, without evidence, to imagine a willing lessee, who would rent the property in such time of uncertainty, stress and decreasing business, and increasing cost of operation, on the basis of the earnings during the prosperous three-year test period ending June 30, 1917 and usually referred to as the test period. The board of referees accordingly held that the Government should pay to appellant compensation on the basis of its average net income for the six months of the test period, and in addition, pay the difference between one-half of the amount appellant expended for maintenance of its railroad, on the average, in one year during the test period, and the amount it spent for such purpose during the period January 1 to July 1, 1918;

and also one-half of the average annual amount charged by appellant to depreciation during the test period. There was no evidence of a greater depreciation on account of the government's action; nor that any greater maintenance was rendered necessary. The items were all book-keeping matters and allowed solely on the theory that a willing lessee would enter into a lease on January 1, 1918, to pay appellant such amounts for the use of the railroad during the time in controversy. This doctrine was adopted in spite of the board's conclusion:

> There is no evidence of the amount for which the railroad could have been rented, and there is no likelihood that there was any market for its rental. (R. 12.)

It is certain that no such willing lessee could have been found. It is doubtful, considering the threatening conditions confronting a supposed lessee, whether he would become a lessee of such property at such a time upon any terms. Why then should the board adopt such an artificial and imaginary method of compensation, without any evidence, and contrary to the known facts, when a clear, easy and fair measure of compensation, based upon undisputable evidence, was open to, and we think, obligatory upon it?

We now have the results of operation by appellant. It operated as if there had been no proclamation of the President, and with the same re-

sults; and the proof shows that all revenues derived therefrom have already been appropriated by appellant to the use of itself and the maintenance of the property. The results of such operation show what the profits from use of appellant's property actually were during the time in question, and show amount of appellant's loss, had appellant been deprived of them. Appellant, however, received such profits; hence, it suffered no loss. If the Government had received the profits, such profits would have been the measure of appellant's recovery under the well established and just rule, which must be just alike to the Government and the owner; but, since appellant has already received such profits, it is already fully compensated. The board was evidently misled by the provision of Section 1 of the Federal Control Act, which authorized the President to make agreements to compensate railway companies whose properties were actually taken over and operated by the Government. Such section authorized the President—

> To agree and to guarantee to any such carrier * * * that during the period of Federal control it shall receive as just compensation, an annual sum * * * not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917.

Such provision, however, contemplated that the owner was dispossessed and that the Government

was actually in possession and operation of the property. Such section defines " Federal control " as involving " the possession, use, control and operation " of certain railroads by the President. The President was authorized to agree with the owners of the roads under " Federal control," roads of which he had taken over the " possession, use, control and operation," to compensate them for such taking on the basis of the average annual net income of such roads for the three-year test period. Such provision, however, did not create of the Government a tenant of the property; nor did it transform the taking, which occurred nearly three months before the Federal Control Act was adopted by Congress, into a leasing. The act of taking was still the exercise of the power of eminent domain and was subject to the constitutional right of the owner and of the Government alike, in reference to ascertaining and making compensation for the taking.

The fixing of compensation, in the absence of an agreement, must be a judicial proceeding rather than a legislative act. That the taking was an exercise of the power of eminent domain, and not the creation of the relation of landlord and tenant, or lessor and lessee, is held in *North Carolina Railroad Co.* v. *Lee,* 260 U. S. 16, where it is said:

> Under the Federal Control Act the government operates a railroad, not as lessee, but under a right in the nature of eminent domain.

The same doctrine is announced in *E. I. DuPont de Nemours & Company* v. *Davis,* 264 U. S. 456.

In the case of a taking of property, under the power of eminent domain, the parties may always agree on the compensation if they are able and choose to do so; but if they cannot agree, the courts and not the legislature determine the amount of Compensation. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, 327, 338; *United States* v. *New Rivers Collieries,* 262 U. S. 343–4.

The fact that the Government was involved, and that the President was the mere agent of the Government, made it advisable for Congress to give the Agent express authority and to limit him as to the amount of compensation he would agree to pay the owners of the properties actually taken; but the fact that the President was permitted to pay such amount did not give the railroad company, whose property was actually taken, the right to demand such amount or the right to have such amount. It is to be remembered that this permission to the President is confined to railroads " in the possession, use, control, and operation " by the President, and creates an authority in the President, but no right in the Railway Company until the President exercises authority and makes an agreement in harmony with the act. Either can decline to agree on such terms, or on any other terms, in which event the rules of law governing the

fixing of compensation for property taken for a public use, as announced and administered by the courts, apply and govern the rights of the parties. Such permission to the President to fix the compensation on basis of average annual net income for the test period did not extend to appellant's property, because it was not in the possession, use, control, and operation of the President. Appellant's property may have been in nominal control of the President, but was not in his possession, use, or operation. All of such matters were necessary to bring appellant's property under the operation of the statute. If, however, it be conceded that appellant's property was under Federal control, *in the absence of an agreement fixing compensation*, the parties are left to the ordinary judicial procedure and to the rules applicable, which require a compensation just to both parties, a compensation that will recompense the owner without giving him a fictitious and exaggerated compensation, and that will require the Government to pay only the amount that will put the appellant in as good condition pecuniarily as it would have occupied if its property had not been taken.

Appellant operated and managed its railroad just as it would have operated and managed it if the government had done none of the things complained of; and the traffic, revenues, and expenses, not having been affected thereby, the net earnings measure the value of the use of the property during

the time in question. Appellant received and retained such net earnings and is therefore " in as good condition pecuniarily as it would have occupied if its property had not been taken." To make a further allowance " would be unjust to the United States." Appellant is not entitled to recover anything in this action, and the judgment of the Court of Claims so holding is right and should be affirmed.

III

Assuming that appellant's railroad was taken under Federal control as defined by the Federal Control Act, from January 1, 1918, to June 30, 1918, inclusive, the amount of just compensation due it is to be measured by the pecuniary loss suffered by it resulting from such control

(a) Pecuniary loss is measured by the value of the use of which the owners were deprived

In the case at bar the thing the owners were deprived of, if anything, by reason of its alleged Federal control, for the first six months of 1918, was the " value of its use."

Under the act of Congress of August 29, 1916 (39 Stat. 645, chap. 418, Comp. Stat. 1916, #1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095) the President was given power—

> In time of war * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other

> traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The extent or degree of the use which the President might make of appellant's railroad was left to his discretion. The object Congress had in mind was to enable the President to assume dominion over the railroads in order that he might, should the emergency require, *utilize the same to the exclusion as far as might be necessary of all other traffic thereon*. The extent therefore of the exercise by the President of the dominion or control assumed over a particular railroad in so far as such exercise may have affected the " value of its use " to its owners is a matter of proof. Just compensation is to be measured by the pecuniary value of the use of said railroad of which the owners were deprived.

In *Cleveland, etc., Ry. Co.* v. *Backus,* 154 U. S. 439, 445, the Court in speaking of the value of a railroad said:

> There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value.
>
> The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner.
>
> *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 328.

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of and no more. To award him less would be unjust to him; to award him more would be unjust to the public.
>
> *Bauman* v. *Ross,* 167 U. S. 548, 574.

The owner is entitled to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

> *United States* v. *New River Collieries Co.,* 262 U. S. 341, 343.

In *United States* v. *Chandler Dunbar Co.,* 229 U. S. 53, the Court on page 76 quotes as follows from the case of *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189:

> The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from it. The question is what has the owner lost, not what has the taker gained.

(b) No proof that the value of the use was diminished by Federal control, and if so, no proof of the pecuniary value of such diminution

The burden to establish the amount of compensation is on the owner of the property and unless he proves by his evidence the amount of damage done, he can recover only nominal damages.

> *Tanner* v. *Canal & Irrigation Co.,* 40 Utah 105, affirmed in 239 U. S. 323.

In *C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, a suit to condemn the right to an easement for a street across the right of way of the railroad, held:

> The measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purpose of a street. If the opening of the street across the railroad tracks did not unduly interfere with the carrier's use of the right of way for legitimate railroad purposes then its compensation would be nominal.

As said by the Court of Claims in the instant case:

> There must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him deriving the benefits which have accrued had the property not been taken. (Rec. 42.)

(c) Pecuniary condition of appellant not changed by said control

Appellant's railroad transported the same traffic in kind and volume as it would have transported had it not been included in the President's proclamation. It charged the same rates, paid the same expenses and made the same repairs to its property and spent the revenue just the same as it would have done and realized the same net returns that it would have realized had the President not is-

sued his proclamation or the Director General the general orders received by appellant. By the testimony of its own General Manager it continued to operate its road from December 26, 1917, to June 29, 1918, exactly as it always had operated it. (Rec. 39, 40, Finding XIII.) The value of the use of appellant's railroad is demonstrated by its net earnings derived from the use thus made of it while so operated. During the period in question it had a net income of $1,897.43 which it retained for its own use; it turned over none of its earnings to the Director General or the United States. (Rec. 39, Finding XIII.) There is no evidence whatsoever that the receipt of the general orders from the Director General caused it any loss of revenue or in any way caused it to increase its expenditures and hence any difference in net income during said period compared with its net income prior thereto can not be attributed to the alleged Federal control of its property. So far as the evidence shows appellant was at the termination of the alleged Federal control in as good condition pecuniarily as it would have occupied if its property had not been taken in the manner shown by the proof.

(d) The assumed fair rental value of appellant's railroad for an indeterminate period used by the board as a measure of just compensation was erroneous

Counsel for appellant contends that the measure of compensation is the rental value of its railroad

during the time it was under Government control. (App. brief 37.)

In *N. C. R. R.* v. *Lee,* 260 U. S. 16, a case where the railroad was being operated solely by the Director General under the Federal Control Act, this Court said:

> The Government operated this railroad not as lessee, but under a right in the nature of eminent domain.

Whether rental value would or would not be a correct measure of compensation such measure can not be used in the case at bar because the board of referees states:

> There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. (Rec. 12.)

(c) The amount of just compensation is not to be measured by the amount to which the President was limited in the making of a voluntary agreement under section 1 of the control act

Counsel on page 40 of his brief says "plaintiff's claim rests upon the promise of the United States to pay for the use of the property a sum equivalent to the average of the three-year period mentioned in the proclamation and the law."

By Section 1 of said Control Act, supra, the President was authorized to agree with and to guarantee to any such carrier (of which he had taken over the possession, use, control and operation)

* * *

> that during the period of such federal control it shall receive as just compensation an annual sum * * * for each year and pro rata for every fractional year of such control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth nineteen hundred and seventeen.

By this act Congress merely provided that the President might in his discretion make an agreement regarding the amount of compensation to be paid such carrier with the limitation, however, that such amount should not exceed the above sum unless, as provided in paragraph 6 of said section, he should find the condition of the particular carrier was abnormal during the three-year period referred to so as to make the basis of such earnings plainly inequitable as a fair measure of compensation. Such agreement was a purely voluntary one on the part of the President and of the carrier. The entire scope and purpose of Section 1 was to afford an opportunity for a voluntary agreement. It has no reference to what may be done under Section 3. It does not undertake to establish a rule of compensation. It simply affords an opportunity to keep the question of compensation out of litigation. The idea was to offer a suggestion or basis for a voluntary agreement and thus provide a means of reducing the number of cases which

might go into the courts, with the innumerable delays and uncertainties of litigation. It was an alternative to a law suit. It did not require the President to make any contract of any kind. It was not mandatory.

In the event that no such agreement was made the parties were relegated to a semijudicial body for the ascertainment of the amount of just compensation, if any, due from the Government. Section 3 provided:

> That all claims for just compensation not adjusted (as provided for in Section 1) * * * shall be submitted to a board of referees, (etc.) which board shall give full hearings to such carrier and to the United States; shall consider all the facts and circumstances and shall report as soon as practicable in each case to the President the just compensation. (Etc.)

If Counsel's proposition that the Government agreed to pay the standard return (operating net income for three years ended June 30, 1917) is correct then there would have been no occasion for a hearing before a board of referees, as the Federal Control Act provided that the Interstate Commerce Commission was to certify the standard return; hence the only remaining question, in order to ascertain the amount of just compensation, would be to subtract the earnings of the carrier from such standard return.

(f) The prima facie effect given the finding of the board of referees merely establishes a rebuttable presumption

Counsel for appellant insists (brief, p. 43) that because Section 3 of said Control Act provides that—

> In the proceedings in said court (Court of Claims) the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated.

the Court of Claims was in error in holding that—

> The finding of the amount of the award for such compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the government of plaintiff's property for public use. (Rec. 42.)

In *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 442, 430, in speaking of the provision in Section 16 of the Interstate Commerce Act which provided that in a suit brought to recover an award of damages made by the Commission the findings and order of the Commission shall be prima facie evidence of the facts therein stated, the Court said (43):

> This provision only establishes a rebuttable presumption—At most it is only a rule of evidence.

If the basis or theory used by the board of referees in arriving at the amount of its award is erroneous the prima facie affect thereof is overcome.

Penn. R. R. Co. v. *Jacoby,* 242 U. S. 89.

(g) The earnings for a certain prior period should not be used as a basis of comparison with the period of alleged Federal control unless all conditions of both periods are considered

Although the board of referees found there was no market rental value of the railroad and although it appears from its petition that appellant only claims to have been under Federal control for the first six months of 1918 the board used as a measure of compensation for said six months the fair rental value based upon an average of expected earnings for a period of years in the future and not upon the immediate outlook of business for the first six months of 1918, the period of alleged Federal control. (R. 14.)

To ascertain the value of the use of this railroad to its owners from January 1, 1918, to July 1, 1918, the board took its annual net earnings from June 30, 1914, to and including June 30, 1917, and found what the average of such earnings had been for one year and divided this amount in half, thereby finding the average earnings for six months, which latter sum the board held was the value of the use of the railroad from January 1, 1918, to July 1, 1918.

We contend that if earnings for a certain prior period are used as a measure of future earnings

the prior period covering such earnings should correspond with the period of alleged Federal control, that is, the first six months of the calendar year, because there is frequently a marked difference between the net earnings during the winter months and those during the remainder of the year. The net earnings in the winter months are not only often affected by a decrease in the volume of tonnage but also by increased operating expenses.

(h) It was error to refuse to consider evidence of actual operating results during period from January 1, 1918, to July 1, 1918

In the case of property regularly the subject of leasing, an inquiry as to the terms upon which leases of the property were being made at the time of the exercise of the power of eminent domain, may be a guide to the fair market value for the temporary use of it. That, however, is because in those cases temporary use has a fair *market* value, and the evidence of the agreements reached by willing lessors and willing lessees with respect to similar property stands upon the same footing as, in the case of the taking in fee, do to those sale prices reached by agreement between willing sellers and willing purchasers. These prices, subject to definite limitations, are, however, admitted not as being conclusive as to the fair market value of the thing taken, but as being evidence which may be considered with other evidence in determining what the fair market value was. But even in such

cases what the willing lessee or purchaser would have been willing to pay at the time of the taking is not conclusive as to the value at the time. The fact that persons could be found who would have given or promised a certain amount for the use of the property does not preclude the consideration of the history of the property subsequent to the taking for the purpose of getting at its true value when taken so that compensation may be just to the Government as well as to the owners. This was pointed out by Mr. Justice Holmes in *San Diego Land & Tea Company* v. *Jasper,* 189 U. S. 439, when he said (444):

> Of course it is hard to answer the proposition that value expressed in money depends upon what people think at that time. That determines what they will give for the thing; and, whether they think rightly or wrongly, if they or some of them will give a certain price for it, that is its value then. Nevertheless, it has been held, under some circumstances, even in ordinary suits, that when events have corrected the prophecy of the public the facts may be shown and a more correct valuation adopted. Cases cited.

The board refused to consider evidence offered by appellee showing the actual operating income and volume of revenue tonnage of appellant's railroad subsequent to January 1, 1918, the beginning of alleged Federal control, and also refused to consider evidence showing the result of the operation of the road after such control had ceased.

The case was heard by the board on June 19, 1922, more than three years after the alleged Federal control had ceased. The issue then before the board was not what the owners *might be expected* to lose but what, if any, loss *had* they suffered by reason of said control. The attempt of the board to estimate or guess what an imaginary lessee of the property might have been willing on December 28, 1917, to agree to pay, under the then existing conditions, for the temporary use of the railroad involves the most extreme speculation. Such speculation was wholly unwarranted because the matter did not, at the time of the hearing, lie in the realm of prophecy and speculation but of history. The general economic and other conditions characterizing the period in question could have been fully ascertained. It was unnecessary for the board to try to put itself back nearly four years and, having first pursuaded itself that someone would have leased this property (although it found no one would have done so) to attempt to guess what this imaginary lessee would have paid for it. The rational and judicial thing to have done was to look at the results actually accomplished and to inquire what there was in the record to indicate that the appellant, in the absence of Federal control, could or would have produced any different or better results. It would seem that the net earnings during the period in question should be considered prima facie evidence of what the owners would have earned in the absence of evidence of the acts

of the Government which appellant claims constituted a taking of its railroad, especially in view of the fact that appellant remained in the possession and management and operation of its railroad and operated it as it always operated it and without let or hindrance of the Government.

If the value of the use of appellant's railroad prior to the alleged taking is to be measured by its productiveness under the free management and operation of its own officials, then its productiveness during Federal control under the management and operation of its own officials is also the measure of the value of its use, except in so far as it is shown that such management was restricted or interfered with by the Government.

Again, it is not clear to us, why the board should base the amount of compensation on anticipated earnings for a *period of years* when it was admitted that the alleged period of control was only for six months. *Knoxville* v. *Knoxville Water Company,* 212 U. S. 15; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153.

(1) The board of referees adopted an erroneous basis for awarding compensation, considered improper and incompetent evidence, and refused to consider competent evidence bearing on appellant's loss, if any, from the alleged taking of its property, and its report is therefore without prima facie effect

The referees adopted as the measure of compensation awarded to appellant the utmost the President was authorized by Section 1 of the Federal Control Act to agree to pay to any carrier whose

property was actually taken and operated by the Government. (R. 13.)

In adopting such measure the board assumed the relation of lessor and lessee between the appellant and the Government. In its report the board said:

> The board finds the compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. (R. 12.)

In the succeeding paragraph of the report, however, it is said:

> There is no evidence as to the amount for which the railroad could have been rented, and there is no likelihood that there was any market for its rental. (R. 12.)

If it be assumed that appellant's railroad was taken into the possession and control of the Government, such possession was not that of a tenant or lessee, but was in the exercise of the power of eminent domain. In *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16, it is said:

> Under the Federal Control Act the government operates a railroad, not as lessee, but under a right in the nature of eminent domain.

In *E. I. DuPont de Nemours* v. *Davis,* 264 U. S. 456, it is said:

> In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity as a war

> measure, under a right in the nature of eminent domain. (*North Carolina Railroad Co.* v. *Lee,* 260 U. S. 16.)

It is true that in taking property for public use under the power of eminent domain an implied promise to make compensation is assumed. Such compensation, however, is to be measured by the loss such taking causes the owner. *United States* v. *New Rivers Collieries Co.,* 262 U. S. 341, 343, 344.

In *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106–123, it is said:

> It is settled by the decisions of this court that just compensation is the value of the property taken at the *time* of the taking. (Italics ours.)

The thing taken, in the instant case, if anything, was the use of appellant's railroad. The compensation, if any, appellant is entitled to is the value of such use "at the time of the taking." The board, however, allowed the value of the use during the three-year period ending June 30, 1917, instead of the period of alleged Federal control. It is shown that conditions during the three-year period, adopted by the board, were vastly different from the conditions during the period of alleged Federal control of appellant's railroad. The board not only adopted such prior period, but allowed the utmost amount Congress authorized the President to agree to pay any carrier whose property was acually taken and operated by the Government. The board apparently fell into such error by assum-

ing the President was required to pay for the use of a railroad under Federal control the maximum amount authorized by Congress in Section 1 of the Federal Control Act; and that such provision was, in effect, a guaranty that a carrier under Federal control would be paid such amount. There is no basis, however, for such assumption. The Act authorized the President to—

> agree with and guarantee to any such carrier compensation in an annual sum * * * *not exceeding* a sum equivalent as nearly as may be to its average annual railway operating income for three years ended June 30, 1917. (Italics ours.)

It will be noted there is a vast difference between authorizing the President to pay a sum *not exceeding* a certain amount, and authorizing him to pay *such certain amount.* The effect of such authority to the President is to permit him to agree to pay a sum *not exceeding* a certain amount, and leaving to his discretion, in a particular case, whether he shall pay such full amount or a lesser sum. It is true that Section 1 of the Act permitted the President to pay an amount in excess of such average annual operating income for the period described, in cases where unusual conditions were presented, such as receivership, extensions, new equipment and improvements, earnings from which were not fairly reflected in the test period. Nothing of such character is presented in this case, and the President was limited

75

to the average annual operating income of appellant during the test period. The statute, barring such exceptional cases, fixed the maximum beyond which the President could not go, but left to his discretion the amount he would agree to pay within such maximum. If the loss to the carrier in the taking was, in the judgment of the President, less than such maximum amount, he was bound to agree to pay less than such maximum amount. He was not authorized to pay more than the carrier's loss resulting from the taking. If the condition of the carrier, or of traffic, or of business at the time of the taking was such as to make the average income from the test period excessive compensation, the President was bound to agree to pay less than such average annual income. The President was bound, if he made an agreement, to make one within the limits prescribed and just to the United States as well as to the carrier. In addition to adopting the wrong theory of the law, the board of referees refused to give any consideration to the actual results of operation of appellant's railroad under its own management during the time for which it is claiming compensation, and relied entirely on the operating results during the test period in arriving at the amount of compensation awarded. The report and allowance of the board of referees, being based upon such errors, is without prima facie effect. (See *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 442, 428; *Pennsylvania Railroad Company* v. *Jacoby,* 242 U. S. 89.)

That such errors destroyed the prima facie effect of the report is held by the Court of Claims in its opinion in this case. (R. 42.)

(J) Allowance by board of referees for maintenance and depreciation

The board of referees, in addition to awarding appellant compensation on the basis of its average annual operating income for the three-year test period, allowed for depreciation and undermaintenance of appellant's railroad during the period January 1 to July 1, 1918, the aggregate sum of $4,697.37, of which $2,514.87 was for depreciation, and $2,182.50 was for undermaintenance. These allowances were based on the average charges made by appellant in its books for such matters during the three-year test period. Equation factors were applied to take care of the higher cost for labor and materials during the period of alleged Federal control. (R. 18, 19, 20, 21, and 22.)

The computation relied upon by the board is shown in tabulated statement at pages 20 and 21 of record. It will be noted that appellant charged to depreciation during entire year ended June 30, 1917, only $894.12 (R. 41); while the board awards depreciation in the sum of $2,514.87 for the six-months' period in controversy; such amount being one-half the alleged annual depreciation charged on appellant's books for the three-year test period ended June 30, 1917.

74996—25——6

The undermaintenance allowed is arrived at by taking the difference between one-half of the average annual expenditures for maintenance during the three-year test period and the amount expended by appellant for maintenance during the time in controversy, after applying equation factors based upon higher costs during the period of alleged Federal control.

The allowance, so far as depreciation is concerned, is thus seen to be a mere bookkeeping transaction, and is not based on any actual depreciation.

The allowance for maintenance involves merely a difference in expenditures during the two periods, without any showing that the condition of the property was such as to justify greater maintenance expenditures. The failure to expend a greater amount for maintenance rests with appellant. It followed its own judgment and discretion in the premises. It had a net income which could have been so expended if it had thought further expenditures were desirable. It did not consult the Government, and the Government gave it no suggestions. In view thereof, the following observation of the Court of Claims is particularly apt:

> If the plaintiff did not adequately maintain its property while it was in its own possession, and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay the plaintiff for the maintenance of its property? (R. 45.)

The depreciation of appellant's railroad, as well as the necessary expenditures for maintenance, would have been the same if the Government had done none of the things relied upon by appellant as a taking of its property. Appellant suffered no loss in these respects on account of alleged Federal control of its railroad. The allowance by the board would make the Government liable for matters for which it was not responsible, and would give to appellant compensation for a loss it did not suffer.

CONCLUSION

We, therefore, conclude that appellant's railroad was not taken under Federal control; that its railroad remained in its own possession and was operated by plaintiff in accordance with its own judgment and discretion, free from any interference by the government during the entire time in controversy; that if there was a technical or nominal control of appellant's property by the Government, same did not cause appellant any loss or damage and does not entitle appellant to any compensation from the Government; that if there was interference by the Government with appellant's railroad, the evidence is insufficient to show any actual loss or damage; that the report of the board of referees can not take the place of evidence or have any prima facie effect as showing the amount of loss, if any, suffered by the appellant, or the

amount of compensation, if any, to which it is entitled on account of the acts of the Government, for the reason that the same is based on erroneous conception of the relation of the Government to appellant's property, and because of erroneous views of law, reliance on improper testimony, and the refusal to consider proper testimony bearing upon the question of loss, if any, suffered by the appellant on account of the things done by the Government and of which appellant complains; and, further, that the evidence shows conclusively that appellant has received and retains the net income resulting from the operation and use of its property during the time in controversy, which net income measures the value of the use of appellant's said property during said time, and constitutes the full measure of compensation to which appellant would be entitled, if it be assumed that its railroad was actually taken and used by the Government.

The conclusion of the Court of Claims is announced in the following language:

> We think that the property of the plaintiff was not taken by the Government. If there was a technical control of the property by the Government, it was of such a character that it did not cause any loss to the plaintiff and does not justify the award of any compensation.

We think the conclusion of the Court of Claims is correct and should be affirmed. We respectfully so ask.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. A. MCLAUGHLIN,
General Solicitor,
United States Railroad Administration.

SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

DECEMBER, 1925.

APPENDIX

[PUBLIC—No. 107—65TH CONGRESS]

[S. 3752]

AN ACT TO PROVIDE FOR THE OPERATION OF TRANSPORTATION SYSTEMS WHILE UNDER FEDERAL CONTROL, FOR THE JUST COMPENSATION OF THEIR OWNERS, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the ac-

counts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition

thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning

of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal

conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

UNITED STATES RAILROAD ADMINISTRATION

GENERAL ORDER NO. 3

All carriers by railroad subject to the jurisdiction of the undersigned are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs effective January 21, 1918, wherein demurrage rules, regulations, and charges shall be changed so as to provide—

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. Demurrage charges per car per day or fraction of a day until car is released, as follows: $3 for the first day, $4 for the second day, and for each succeeding additional day the charge to be increased $1 in excess of that for the preceding day until a maximum charge of $10 per car per day shall be reached on the eighth day of detention beyond free time, the charge thereafter to be $10 per car per day or fraction thereof. These charges will supersede all those named in existing tariffs applicable to domestic freight, and specifically contemplate the cancellation of all average-agreement provisions of existing tariffs.

No change is authorized hereby to be made in demurrage rules, regulations, and charges applying on foreign export freight awaiting ships at export points.

Upon my request, the Interstate Commerce Commission has issued Fifteenth Section Order

No. 25, authorizing the filing of tariffs to accord with this order to become effective January 21, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Dated at Washington this 5th day of January, 1918.

W. G. McAdoo,
Director General of Railroads.

Director General of Railroads,
Interstate Commerce Building,
Washington, D. C.

ORDER NO. 7

All carriers by railroads, subject to the jurisdiction of the undersigned, are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs in the form shown in the attached appendix, effective February 10, 1918, wherein demurrage rules, regulations, and charges shall be changed so as to provide:

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.
(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. That the average agreement rule be permitted, but that it apply solely to cars held for unloading.

C. That under the average rule the number of days on which debits accrue be made four instead of five.

D. That the demurrage charge on all cars, after the expiration of the free time allowed, be $3 for each of the first four days, $6 for each of the next three days, and $10 for each succeeding day.

E. That the bunching rule be reinstated with the following change in paragraph 2:

Cars for unloading or reconsigning.—When, as the result of the act or neglect of any carrier, cars originating at the same point or at intermediate points moving via the same route and destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the carrier in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to carriers' agent within fifteen (15) days.

These charges will supersede all those named in any existing tariffs applicable to carload freight except:

1. Cars loaded with live stock.
2. Empty cars placed for loading coal at mines or mine sidings or coke at coke ovens and cars under load at mines or mine sidings or coke at coke ovens.
3. Foreign export freight awaiting ships at ports.
4. Coal for transshipment at tidewater or lake ports.
5. Empty private cars stored on railroad or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

and specifically contemplate the cancellation of all conflicting provisions of existing tariffs.

Upon my request the Interstate Commerce Commission has issued Fifteenth Section Order No. 300, authorizing the filing of tariffs to accord with the appendix hereto and to become effective February 10, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Order No. 3 is hereby withdrawn and canceled.

Washington, D. C., January 29, 1918.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Office of the Director General,
Washington, D. C., March 14, 1918.

GENERAL ORDER NO. 10

Each and every carrier subject to Federal control shall, prior to May 1, 1918, commence taking an inventory of its materials and supplies by actual count, measurement, weight, etc., and shall immediately upon completion thereof adjust such inventory, by additions and deductions, to December 31, 1917; provided, however, that any such carrier that has taken an inventory of its materials and supplies in the form indicated within 90 days prior to December 31, 1917, or subsequent to the latter date, shall not be required to take an additional inventory, but shall adjust the inventory previously taken, by additions and deductions, to December 31, 1917.

The said inventory shall be preserved in the files of the carrier.

W. G. McAdoo, *Director General.*

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, March 21, 1918.

GENERAL ORDER NO. 12

It is ordered that the following rules be observed with respect to all railroad work involving charges to capital account, viz:

First. In determining what additions and betterments, including equipment, and what road extensions should be treated as necessary, and what work already entered upon should be suspended, please be guided by the following general principles.

(*a*) From the financial standpoint it is highly important to avoid the necessity for raising any new capital which is not absolutely necessary for the protection and development of the required transportation facilities to meet the present and prospective needs of the country's business under war conditions. From the standpoint of the available supply of labor and material, it is likewise highly important that this supply shall not be absorbed except for the necessary purposes mentioned in the preceding sentence.

(*b*) Please also bear in mind that it may frequently happen that projects which might be regarded as highly meritorious and necessary when viewed from the separate standpoint of a particular company, may not be equally meritorious or necessary under existing conditions, when the Government has possession and control of the railroads generally, and therefore when the facilities heretofore subject to the exclusive control of the separate companies are now available for common use, whenever such

common use will promote the movement of traffic.

Second. The construction of new lines or branches or extensions of existing lines shall not be entered upon or contracted for without the Director General's approval.

Third. No new locomotives or cars shall be ordered or constructed without the Director General's approval.

Fourth. Work contracted for or actually commenced prior to January 1, 1918, and unfinished, may be continued until further order, except in so far as in the judgment of the carrier concerned it may be possible to discontinue or curtail it without substantial loss, in order to conform to the general principles outlined in paragraph "First" hereof.

Fifth. Other work which does not involve charges to capital account in excess of $25,000 may be contracted for and commenced without approval of the Director General, provided that—

(*a*) It conforms to the policy outlined in paragraph "First" hereof; that

(*b*) It also falls clearly within the policy of the particular carrier as that policy has been applied in practice during the two calendar years 1916 and 1917; and that

(*c*) A report giving a brief description of each project involving not less than $5,000 nor more than $25,000 chargeable to capital account and showing also the amount chargeable to operating expenses, shall be made in duplicate to the Director of the Division of Capital Expenditures at Washington and regional director for the district within 10 days after the work shall be contracted for or commenced.

Sixth. No work involving a charge to capital account in excess of $25,000 shall be contracted for or commenced subsequent to January 1, 1918, unless—

(*a*) It conforms to the policy outlined in paragraph "First" hereof; and unless

(*b*) It be authorized by the Director General.

Seventh. The Director of the Division of Capital Expenditures is authorized to prescribe such forms, require such reports and issue such regulations and instructions as may be necessary to carry out this order.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, March 26, 1918.

GENERAL ORDER NO. 15

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(*a*) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company.

(*b*) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point.

(*c*) Generally speaking, an industry shall pay for and maintain (although in special

cases the railroad company may do so), and the railroad company shall own that part of the track on the right of way from the clearance point to the right of way line.

(*d*) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition.

(*e*) The railroad company shall have the right to use the track when not to the detriment of the industry.

(*f*) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention of the regional director, who will report thereon onto the Director General, if conditions seem to warrant.

4. The requirements of State statutes and of State commissions in respect of the construction, maintenance, and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the regional director, who will report

thereon to the Director General, if the conditions seem to warrant.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, D. C., April 3, 1918.

GENERAL ORDER NO. 17

To Chief Executive Officers of Carriers Subject to Federal Control:

It is hereby ordered that the following rules and regulations shall be observed and shall govern the recording of and accounting for all transactions which arise during Federal control:

(1) For accounting purposes Federal control began as of January 1, 1918. Immediate steps shall be taken by each carrier subject thereto, to open new and separate books of accounts, such as cash books, general and subsidiary ledgers and journals, and all supporting and subsidiary books and records incident thereto, upon which shall be recorded transactions which arise under and are incident to Federal control on and after January 1, 1918. Such books shall be designated and are hereinafter referred to as "Federal Books."

(2) The totals of the accounts "Cash," "Demand loans and deposits," and "Time drafts and deposits" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to accounts of the same titles, and credited to a deferred liability account styled "(Name of corporation)—Cash—December 31, 1917." On the corporate books the amount

of such balances should be transferred to a deferred asset account styled "U. S. Government—Cash—December 31, 1917." All cash transactions subsequent to December 31, 1917, relating to operations prior or subsequent thereto, shall be recorded in the Federal cash book opened as of January 1, 1918.

(3) The total of account "Net balance receivable from agents and conductors" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Agents' and Conductors' balances—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Agents' and Conductors' balances—December 31, 1917."

(4) The total of account "Materials and Supplies" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Materials and Supplies—December 31, 1917." On the corporate books the amount of such balance should be transferred to a deferred asset account styled "U. S. Government—Material and Supplies—December 31, 1917."

(5) In addition to the assets above specified, there shall be likewise transferred to the Federal books and similarly recorded thereon, such other working assets of the corporation as may be mutually agreed upon.

(6) There shall be currently entered, upon such Federal books, in the manner and under the rules

and regulations prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, all transactions involving revenues, expenses, taxes and rentals, and other items corresponding to those which constitute the basis upon which the standard return to the carrier shall be determined. Such entries shall include corresponding assets and liabilities and the cash settlement thereof; also all transactions involving materials and supplies subsequent to December 31, 1917.

(7) Transactions of the corporation, including those arising out of cash receipts or disbursements, which do not affect or which do not enter into and form a part of those used in determining the basis of standard return, such as interest and dividends received or paid, miscellaneous rents, and other similar corporate transactions, including additions and betterments, shall not be recorded on or passed through such Federal books unless such transactions be negotiated and conducted for account of the corporation by or under the direction of the Director General. Where such income transactions are negotiated and conducted by or under the direction of the Director General the transactions shall be recorded on the Federal books but credited or charged to an account to be opened, styled "(Name of corporation)—Materials and Supactions." Concurrently, corresponding entries should be made on the corporate books charging or crediting the accounts prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, the offset being in an account styled "U. S. Government—Corporate income transactions." Where additions and betterments are

made by or under the direction of the Director General, the expenditures shall be charged on the Federal books to a deferred-asset account "(Name of corporation)—Additions and Betterments." Concurrently, entries should be made on the corporate books, charging the appropriate accounts and crediting a deferred-liability account "U. S. Government—Additions and Betterments."

(8) Current or operating assets, other than those prescribed in paragraphs (2), (3), (4) and (5) hereof, such as, balances due from individuals and companies, and liabilities, such as, vouchers, pay rolls, etc., which were due to or by the corporation as of December 31, 1917, shall not be transferred in detail to the Federal books; but as and when such assets are collected or the liabilities are paid, they shall be credited or debited as the case may be, on the Federal books to a deferred liability account styled "(Name of corporation)—Assets, December 31, 1917, collected," or to a deferred asset account "(Name of corporation)—Liabilities, December 31, 1917, paid." There should be concurrently made, on the corporate books, corresponding entries debiting and crediting the U. S. Government with assets collected and liabilities paid.

(9) Transactions relating to operations, as defined in paragraph (6) hereof, if not previously accrued, shall be included in and shall form a part of the operating results of each carrier regardless of the date thereof. Items clearly applicable to the period prior to January 1, 1918, commonly called "lap-overs," shall be ascertained currently, set up on the Federal books, and included in the appropriate accounts as heretofore. At the end of

each month, the total of " lap-over " credit items shall be charged to an unadjusted debit account styled " Revenue prior to January 1, 1918," and credited to a deferred liability account styled "(Name of corporation)—Revenue prior to January 1, 1918." The total of " lap-over " debit items shall be credited to an unadjusted credit account styled "Expense prior to January 1, 1918," and charged to a deferred asset account styled "(Name of corporation)—Expense prior to January 1, 1918." Operating revenues which have been accrued currently in accordance with the established practice of the carrier, shall be considered as current revenues and not as " lap-over " items.

(10) The accounts between the U. S. Government and the corporation, for which provision is made herein, shall be adjusted in such manner as may be hereafter agreed upon.

(11) Inquiries as to the interpretation and application of the provisions of this order and the procedure to be observed under its requirements shall be addressed to the Director of Public Service and Accounting.

W. G. McAdoo,
Director General of Railroads.

For information only

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., April 22, 1918.

GENERAL ORDER NO. 20

Effective at once, technical and arithmetical examination and checking of all operating bills such as bills for freight and other claims, joint facili-

ties, car repairs, and other similar bills and all statements of accounts such as distribution of freight and passenger revenues and other similar statements, rendered by one carrier subject to Federal control to or against another carrier subject to Federal control, which accrued or which may accrue on or subsequent to January 1, 1918, shall be discontinued. The carrier rendering such statements, bills, etc., shall take the necessary measures to insure the correctness thereof.

W. G. McAdoo,
Director General of Railroads.

For information

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., May 2nd, 1918.

GENERAL ORDER NO. 23

Each and every carrier subject to Federal control shall render a weekly cash report on Form T–5, as per copy herewith.

The first report shall be rendered as of May 4, 1918.

W. G. McAdoo,
Director General of Railroads.

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., May 16, 1918.

GENERAL ORDER NO. 24

On April 30th, a telegram was sent to carriers, instructing them not to renew any expiring fire

insurance policies on property in Federal control, and not to take out any new fire insurance policies upon such property. It was provided that carriers might call attention to cases calling for exceptional treatment. A letter was sent to the carriers confirming this telegram, and the letter suggested care for fire prevention in terms similar to the last paragraph of this order.

It is desired to extend the instructions to other insurance than fire insurance, excepting only bonds or policies insuring fidelity of employes in handling funds.

Carriers, therefore, are now instructed not to renew any expiring insurance of any character, covering property in Federal control, or any liability in connection with the operation or use of any such property, or liability for property transported or stored by carriers under Federal control, and not to take out any new policies, or place any additional or new risks under existing policies, of such insurance, except that this order shall not relate to bonds or policies insuring the fidelity of employes in handling funds. Such fidelity bonds or policies shall be continued, and proper provision made for any necessary changes, as heretofore. Carriers may present to the Director General any special circumstances which they believe call for exceptional treatment.

If the termination of insurance in accordance with this order results, as to any particular property, in the discontinuance by the Insurance Company of inspection or other measures for prevention of loss, it will be desirable to adopt proper substitute therefor, and the carrier shall make reasonable and proper temporary provision for

such inspection or other preventive measures, reporting its action to this office.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, D. C., May 20, 1918.

GENERAL ORDER NO. 25

Effective July 1, 1918, the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be canceled.

(1) Tickets shall be sold only for cash in advance of service. Baggage charges are subject to the same rule as tickets, except C. O. D baggage, and storage charges, which must be paid in cash before delivery.

(2) In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the consignor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier. The form of such bond shall be prescribed by the chief legal officer of the individual carrier, conditioned upon and providing for payment of all

charges within forty-eight (48) hours after forwarding or delivery of the freight. Upon receipt and acceptance of such bond a carrier may accept and forward prepaid consignments or may deliver collect consignments in advance of payment of all charges thereon to the amount covered by the bond. Failure to pay such charges within the time prescribed will automatically cancel such credit.

(3) Treasurers of individual carriers are required to arrange and conduct all matters relating to such credits. They shall designate the amount, and accept or reject the surety offered. Bonds may be required and accepted for individual consignments or blanket bonds may be accepted from individual shippers or consignees to cover all of their consignments for a given period, the period of the credit in such cases shall, however, be limited to forty-eight (48) hours on each shipment as prescribed in the preceding paragraph.

(4) In case of any question as to the accuracy of charges, bills must be paid as rendered and claims presented for alleged errors. This will not prevent adjustments by agents of obvious errors.

(5) Freight consigned to " order " or to " order notify " shall be delivered only upon surrender to the agent of the carrier of the original bills of lading for such freight, and the payment of the freight charges thereon as herein provided. Provided, however, if such bill of lading be lost or delayed the freight may be delivered in advance of surrender of the bill of lading upon receipt by the carrier's agent of a certified check for an amount equal to one hundred and ten (110) per cent of the invoice, or upon receipt of a surety bond either individual or corporate, acceptable to the Treas-

urer of the carrier in an amount for twice the amount of the invoice.

(6) The extension or creation of Local Collection Bureaus or agencies will be authorized by the Director of Public Service and Accounting, as and when such Bureaus may be found to be necessary or expedient.

(7) Bonding or Underwriting arrangements with respect to credits extended, now in effect by individual carriers, shall be discontinued as of July 1, 1918, or as soon thereafter as existing contracts are terminable.

(8) Advice of the foregoing regulations shall be promptly given to all to whom credit accommodations are now given to the end that the regulations may be put into effect at the time specified with as little inconvenience as possible.

(9) Payment of transportation charges by check will be considered as a payment in cash if the person, firm, or company signing or endorsing it is known to the agent to be fully reliable. Checks are not to be taken or cashed by agents under any circumstances except for transportation charges.

(10) Until otherwise ordered the foregoing rules will not apply to transportation service rendered other Departments of the Federal Government.

W. G. McAdoo,
Director General of Railroads.

UNITED STATES RAILROAD ADMINISTRATION,
OFFCE OF THE DIRECTOR GENERAL,
Washington, June 12, 1918.

GENERAL ORDER NO. 30

Settlement of inter-road bills and accounts

Effective July 1, 1918, the following regulations shall govern the settlement of all inter-road bills, statements, and accounts rendered by one carrier under Federal control against or for account of another carrier under such control.

(1) Settlements by vouchers and the drawing of drafts in settlement of individual inter-road bills, statements, and accounts rendered by one carrier under Federal control against another carrier under such control, except as provided for in paragraph (2) hereof, shall be discontinued.

(2) The regulations herein prescribed shall not include:

(*a*) Settlement of accounts between a carrier under Federal control and a carrier not under such control.

(*b*) Settlement of accounts between carriers under Federal control for transactions which do not properly belong on the Federal books of either carrier interested.

(3) Each bill, statement, or account made and rendered by one carrier under Federal control against or in favor of another carrier under such control, and forwarded on and after July 1, 1918, shall be plainly stamped on the face thereof, as follows: "Included in settlement, month of ------ 191__." Such stamp shall indicate the month in which the amount represented by the account will

be included for settlement by the carrier rendering the account, and it shall be included in the same month's settlement account by the receiving carrier. No such bill, statement, or account made and rendered in one month shall be back-dated for a prior month.

(4) On the first of each month each carrier shall prepare and render each other carrier with which it has inter-road transactions, as a basis for a settlement for the month just ended, a statement of debits and credits, in abstract, showing the nature and total of each bill, statement, or account forwarded by it to each other carrier during the preceding month.

(5) There shall be opened as of July 1, 1918, on the Federal books of each carrier, a clearance or settlement account with each other carrier under Federal control with which it has inter-road transactions.

(6) As inter-road bills, statements, or accounts are made and rendered they shall be charged or c redited as the case may be, through the clearance or settlement account prescribed in the preceding paragraph.

(7) As inter-road bills, statements, or accounts are received they shall be:

(*a*) Examined as to correctness, as prescribed in General Order No. 20;

(*b*) Charged or credited to the appropriate operating or other account;

(*c*) Credited or charged (as the case may be) by the receiving carrier to the carrier originating the account through the appropriate clearance or settlement account prescribed in paragraph (5) hereof.

(8) The total of each statement for a given month shall be accepted as rendered, and on or before the fifteenth day of each month subsequent to that for which such statement was rendered the creditor carrier shall draw upon the debtor carrier for the balance between the two statements exchanged by them.

(9) In the event the statement referred to in paragraph (4) indicates that the originating carrier has charged or credited the other carrier with a bill, statement, or account which has not been received, the carrier to which the statement is rendered shall accept the account and credit or debit the originating carrier therewith to the debit or credit of a suspense account. Such receiving carrier shall immediately take the matter up with the originating carrier for the purpose of locating the missing bill, statement, or account. If it be found that such amount was included in the statement in error, adjustment shall be made therefor in a subsequent statement. If manifest errors be found in such statements by a receiving carrier, the attention of the originating carrier shall be called thereto and such error or errors shall be adjusted in the statement for the subsequent month.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Office of the Director General,
Washington, D. C., June 12, 1918.

GENERAL ORDER NO. 31

Effective July 1, 1918, the following rules and regulations shall govern the accounting for the use

of equipment or facilities of one carrier under Federal control by or for the account of another carrier under such control, provided, nothing herein contained shall be construed to warrant the discontinuance of the keeping, rendition, and settlement of such accounts by a carrier under Federal control in favor of or against a carrier not under Federal control, in the same manner as heretofore.

I. *Hire of freight and passenger train equipment.*

1. The practice of recording, computing, and paying per diem, mileage, or rental for the use of freight and passenger train cars of one carrier under Federal control by or for account of another carrier under Federal control, and the adjustment of differences, reclaims, etc., between such carriers which clearly relate to transactions incurred on or after January 1, 1918, shall be discontinued.

2. Junction cards, interchange reports, location records, and all other records and reports necessary to determine the location of equipment shall be kept, rendered, and compiled as heretofore.

II. *Joint facilities, bills for use of.*

3. Effective with costs incurred on and after July 1, 1918, bills rendered by one carrier under Federal control against another carrier under such control for maintaining and operating (including taxes and rentals) tracks, yards, terminals, and other facilities, including costs to operate equipment used therein, shall be computed, rendered, charged, and paid on the following bases:

(*a*) In cases where the tenancy is not changed under Government operations: The total cost of maintenance, operation,

taxes and rental, as provided for under existing agreements, and the amounts thereof borne by each user, for a period not less than six months ended December 31, 1917, shall be determined by the owning or operating carrier. From such costs, the percentage of the total borne by each user to the total costs shall be determined. The percentages thus determined shall be applied monthly to the total costs incurred on and after July 1, 1918, and bills shall be rendered and paid on the results thus obtained.

(*b*) In cases where tenants or users are admitted to facilities not heretofore jointly used: Federal Managers of the facilities to be jointly used shall determine, as between themselves, a fair and equitable arbitrary basis for the apportionment of the total costs of maintenance, operation, taxes and rental which should be paid by each tenant. Such basis shall thereafter during the period of Federal control be used by the owning carrier as a basis for preparation and rendition of bills against the tenants or users, and such tenants or users shall pay such bills as rendered.

(*c*) In cases where the number of tenants or users of facilities now used by tenants under agreements with owners is increased or decreased: The literal compliance with the terms of such agreements shall be temporarily suspended, for the period of Federal control, and a fair and equitable basis of use shall be determined as prescribed in paragraph (*b*) preceding, except that due regard shall be given to the terms of existing agreements in fixing such arbitrary basis.

(*d*) In cases where a lump sum charge has been made by an owning or operating carrier which is under Federal control for

the use of a facility used by another carrier which is under such control, such bills for the lump sum charge shall be rendered and paid during Federal control as heretofore; provided, however, if there be a change in such tenancy by the admittance of other tenants or otherwise, and the contractual basis upon which the lump sum charge is made be disturbed thereby, an arbitrary basis of charge by the owner against the tenant or tenants shall be determined as prescribed in paragraph (*b*) hereof.

4. Details heretofore required in support of joint facilities bills, statements, and accounts shall be discontinued, except that such bills shall show the totals chargeable and creditable, to the primary operating revenue, expense, tax and rental accounts prescribed by the Interstate Commerce Commission, or which may hereafter be prescribed.

5. If materials and supplies, the value of which is carried in the accounts of one carrier under Federal control, be used by another carrier under such control for maintaining or operating equipment or facilities jointly used, the value at which such materials and supplies are carried in the accounts of the carrier furnishing them shall be billed against and paid for by the carrier using them as heretofore, except that percentages for overheads and other carrying expenses shall not be added to the cost thereof.

W. G. McAdoo,
Director General of Railroads.

APPOINTMENT OF FEDERAL MANAGERS

May 21, 1918.

In view of the direct responsibility for the operation of the railroads of the country placed upon

Director General McAdoo by the act of Congress and by the proclamations of the President, he has been unable to escape the conclusion that it will be advisable to place in direct charge of each property for operating purposes a representative to be known as the Federal manager, who will report to the Regional Director. As far as practicable, this Federal manager will be chosen from the operating officers of the particular property, who are therefore entirely familiar with its employees and with its conditions. Except so far as may be necessary to meet the emergency conditions which compel the Government to take control of the railroads, the Federal manager of each railroad will endeavor to avail himself to the fullest extent of the advantages incident to the operation of the particular railroad as a unit and the preservation of its identity. This is believed to be of essential importance, not only to secure the best results during the period of Government control but also to give the greatest degree of reassurance to the officers and employees that the railroad careers upon which they have entered will not be narrowed, but, if anything, will be broadened, and to give the greatest possible reassurance to the stockholders that their just interests in the properties will be respected and that nothing will be needlessly done to have even the appearance of impairing their just rights.

While in this way the responsibility for the operation of the property will be directly to the Regional Directors and not to the boards of directors, it is the purpose of the Director General to accord to the boards of directors and their representatives the fullest opportunity to keep advised as to the operation and improvement of the properties

and to maintain with the Director General and the Regional Directors the fullest interchange of views as to what is in the best interest of the Government and of the stockholders.

In the development of this policy the Regional Directors and also the Federal managers will be required to sever their official relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.

The first moves in the inauguration of this policy will be through the creation of two new regions to be known as the "Allegheny Region" and the "Pocahontas Region."

The Allegheny Region will consist, broadly, of the Pennsylvania lines east of and including Pittsburgh and Erie, Baltimore & Ohio, east of Pittsburgh and Ohio River including Pittsburgh terminals, Bessemer & Lake Erie Railroad, Cumberland Valley Railroad, Central Railroad of New Jersey, Coal & Coke Railroad, Philadelphia & Reading Railway, Western Maryland Railway, Cumberland & Pennsylvania, and Pittsburgh & Lake Erie. This region will be placed in charge of Mr. C. H. Markham as Regional Director (who has resigned his connections with the Illinois Central and other companies), who will have offices in Philadelphia.

The Pocahontas Region will consist of the Chesapeake & Ohio Railway east of Columbus, Cincinnati, and Louisville, the Norfolk & Western Railway, and the Virginian Railway, including the terminals of all lines at Hampton Roads. With the exception of the Allegheny and Pocahontas Regions, the Eastern Region will remain as originally

defined, with Mr. A. H. Smith as Regional Director, and district directors under Regional Director Smith will be appointed for New England and for that portion of the Eastern Region west of Pittsburgh and Ohio River and south of the Erie main line. The selection of the Regional Directors for the Pocahontas Region and for the Southern Region, succeeding Mr. Markham, as well as of the two new district directors under Regional Director Smith, will be announced later.

The same policy will be applied from time to time as rapidly as may be convenient in other parts of the country, always with the greatest possible regard for all the interests affected and with a view to preserving intact, as far as reasonably practicable, the operating organizations of the companies.

○

INDEX

	Page
Statement	1
Argument:	
Summary	
I. The matters relied upon do not estop the United States from denying claim of appellant that its railroad was under Federal control	1–2
(a) The Interstate Commerce Commission was not authorized to determine whether or not appellant's railroad had been taken by the President and its action in performing the duties created by section 204 transportation act could not control the action of the President in the performance of his duties created by the Federal control act	2
(b) If the Interstate Commerce Commission exceeds its jurisdiction or makes a finding of fact without evidence, or an arbitrary disregard of the evidence, or erroneously applies the law to the facts found, its conclusions are not conclusive even in respect of matters committed to it for determination	7
(c) Appellant does not rely upon an estoppel	8

CASES CITED

Dennison v. *Payne*, 293 Fed. 333–341	6
Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88–91–92	7
Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541–547	8
United States v. *Babcock*, 250 U. S. 328–331	6

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 315

MARION AND RYE VALLEY RAILWAY COMPANY, Appellant

v.

THE UNITED STATES, APPELLEE

APPEAL FROM THE COURT OF CLAIMS

REPLY OF THE UNITED STATES TO BRIEF OF VICTOR A. REMY AS AMICUS CURIAE

In Division II of Mr. Remy's brief is presented the contention that the United States is estopped in this suit from denying that appellant's railroad was under Federal control during the period in controversy. We will address this reply solely to that contention.

ARGUMENT—SUMMARY

I

The matters relied upon do not estop the United States from denying claim of appellant that its railroad was under Federal control

(a) *The Interstate Commerce Commission was not authorized to determine whether or not appellant's railroad had been taken by the President*

and its action in performing the duties created by Section 204 Transportation Act could not control the action of the President in the performance of his duties created by the Federal Control Act.

(b) *If the Interstate Commerce Commission exceeds its jurisdiction or makes a finding of fact without evidence, or an arbitrary disregard of the evidence, or erroneously applies the law to the facts found, its conclusions are not conclusive even in respect of matters committed to it for determination.*

(c) *Appellant does not rely upon an estoppel.*

I

The matters relied upon do not estop the United States from denying claim of appellant that its railroad was under Federal control

(a) *The Interstate Commerce Commission was not authorized to determine whether or not appellant's railroad had been taken by the President and its action in performing the duties created by Section 204 Transportation Act could not control the action of the President in the performance of his duties created by the Federal Control Act.*

The claim of estoppel is based on application made by appellant to the Interstate Commerce Commission for reimbursement for deficit resulting from operation of its railroad during that portion of Federal control of railroads during which its railroad was not Federally operated, and upon refusal of the Commission to make appellant any

allowance for the period in controversy, because of its conclusion that appellant's railroad during such time was under Federal control.

Provision for such reimbursement is made in Section 204, Transportation Act 1920 (41 Stat. 460), set out in full at page 5 of Appendix to Mr. Remy's brief. It will be noted that the administering of such section is confided to the Interstate Commerce Commission. No express provision is made for a hearing or any judicial proceeding. There is no provision for making the President or the Director General of Railroads or any one representing the United States Railroad Administration a party to any procedure the Commission might adopt in administering the act. The only parties involved are the Commission on the one side and the applicant on the other.

While it may be the Interstate Commerce Commission represents the United States in administering the act, if such be the case, it is a representative of limited and special authority confined to the particular matter. The Commission's conclusion that appellant's railroad was under Federal control in such sense as to deprive appellant of the right to be reimbursed for its deficit during such period is not binding on the President in administering the Federal Control Act, and does not control him, in exercising the authority granted to him under such act.

Congress created the Interstate Commerce Commission an agency for one purpose, and the Presi-

dent an agency for another purpose. Each was granted authority for the accomplishment of a particular matter and neither could invade the field of the other or do that which would control the action of the other. It would be subversive of the public interest to permit the question of whether the appellant's railroad had been taken by the President for public use to be determined in an ex parte proceeding, in which the interested party could produce or withhold such evidence as he might choose, and in which no one was authorized to appear and represent the United States and protect its interest. This is especially true where the tribunal before whom such proceeding is pending has been given no authority in the premises. The Interstate Commerce Commission was not authorized to represent the United States in such matter, nor was the Interstate Commerce Commission designated a court before whom the President and appellant might appear and have determined the question of whether appellant's railroad had been taken or was under Federal control. Indeed, Congress expressly withheld such authority from the Interstate Commerce Commission by provision in Section 3 of the Federal Control Act for the appointment of a Board of Referees by the Commission for the purpose of reporting to the President the amount of compensation, if any, to which a railroad whose property had been taken was entitled, with the right of either party to file a petition in the Court of Claims to have such matter

finally determined in the event an agreement could not be reached as a result of the report of the referees.

Such is the proceeding resorted to by appellant and now being prosecuted. In such proceeding is necessarily involved the question of whether appellant's railroad was taken and whether it was under Federal control. To permit a matter confided to a special tribunal, as in this case, to be determined against the United States in a collateral proceeding and by a representative of the United States to whom was entrusted authority in an entirely different matter would be contrary to public policy and would involve serious embarrassment and loss to the United States.

Mr. Remy relies on the opinion of the Court of Appeals of the District of Columbia in case of *Abilene Southern Railroad Co.* v. *Interstate Commerce Commission* (opinion not published, but copy set out in appendix to his brief). We do not believe such opinion aids his contention. A writ of mandamus was sought and denied on the ground that the Commission in the performance of its duties was not acting in merely a ministerial capacity, but was required to exercise a judicial discretion and, under the familiar rule, such discretion could not be controlled by mandamus. Whether the railroad company had some other remedy was not involved and the fact that the Commission's discretion will not be controlled by mandamus does not justify the conclusion that relief could not be

had in an appropriate proceeding, or that the United States will be bound in other proceedings entrusted to other representatives, by a conclusion reached by the Commission in a proceeding of the character involved.

Even if the railroad company was without remedy otherwise, rights would not be created, by the action of the Commission, against the Government in some other capacity. The Government is under no obligation in creating rights in individuals to provide a remedy for their enforcement through the courts. *United States* v. *Babcock,* 250 U. S. 328-331. The Government is immune from suits unless it consents to be sued. When it does consent to be sued the conditions imposed must be strictly followed. It consented to be sued for the taking of railroads under Federal control in the tribunals and in accordance with the method provided in the Federal Control Act. It did not consent to be made liable by a ruling of the Interstate Commerce Commission in a proceeding under some other act of Congress. To permit a liability to be so established would be in effect a recognition of a judgment against the United States rendered by a tribunal to whom jurisdiction had not been given, and in a suit brought contrary to the terms of the consent of the Government to be sued.

Mr. Remy relies on case of *Dennison* v. *Payne,* 293 Fed. 333, C. C. A. Second Circuit, but the doctrine there announced does not aid his contention. The true rule is stated in the opinion in that case

in paragraph (3-5) on page 341 of the report, to the effect that if the tribunal involved was without jurisdiction, its judgment is not merely voidable but absolutely void, and the doctrine of res judicata can have no application.

(b) *If the Interstate Commerce Commission exceeds its jurisdiction or makes a finding of fact without evidence, or an arbitrary disregard of the evidence, or erroneously applies the law to the facts found, its conclusions are not conclusive even in respect of matters committed to it for determination.*

We earnestly contend that the Interstate Commerce Commission's conclusions in administering Section 204 of the Transportation Act can in no respect bind the President in the performance of his duties, whether under the Federal Control Act or the Transportation Act. If, however, the Commission had jurisdiction in the premises, its conclusion would not operate as an estoppel in this case, since the *evdience* bearing on the question of whether appellant's railroad was taken is not in dispute and the question of whether there was a taking becomes a question of law. If the Commission erred in applying the law to the undisputed facts, its conclusion furnished no impediment to a determination of such question on its merits in this proceeding. The rule in such cases is aptly stated in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88–91–92, as follows:

> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders quasi judicial in character are void if hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" (citing authorities), or if the facts found do not as a matter of law support the order made. * * * In a case like the present the courts will not review the Commission's conclusions of fact by passing upon the creditability of witnesses or conflicts in the testimony. *But the legal effect of evidence is a question of law.* A finding without evidence is beyond the power of the Commission. *An order based thereon is contrary to law* and must, in the language of the statute, be "set aside by a court of competent jurisdiction." (Italics ours.)

The same rule is announced in *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541–547, and numerous other cases.

We conclude there is no basis for the claim of estoppel, and that the question of whether or not appellant's railroad was taken by the President must be determined in this case on its merits and upon the facts and the law presented.

(c) *Appellant does not rely upon an estoppel.*

We are not unmindful of the doctrine that to be relied upon an estoppel must be pleaded. Despite the fact that appellant has not pleaded an estoppel

and does not rely thereon, and that ordinarily under such circumstances the court will not consider such question, we desire same to be considered and disposed of in this case as though properly pleaded and relied upon by the appellant. There are a considerable number of cases of this character awaiting the final determination of this suit and it is important in aid of a speedy winding up of the affairs of the Railroad Administration that this question be disposed of, if possible, in this suit.

It is significant, however, that counsel for appellant, who has been general counsel for the association of short-line railroads from the beginning of Federal control, and who has represented them throughout in all proceedings before Congress and the courts, has not regarded the action of the Interstate Commerce Commission, relied upon by Mr. Remy, as being an adjudication, or as creating any estoppel in this suit. It has remained for a "friend of the court" to make such claim.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
A. A. MCLAUGHLIN,
General Solicitor,
United States Railroad Administration.
SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

DECEMBER, 1925.

○

SUPREME COURT OF THE UNITED STATES.

No. 315.—October Term, 1925.

Marion & Rye Valley Railway Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[March 1, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Marion & Rye Valley Railway Company, a short-line railroad, brought this suit in the Court of Claims to recover $14,425.94 as compensation for the alleged taking possession and use by the United States of its railroad during the period beginning December 28, 1917 and ending June 29, 1918. That sum is the amount which, on September 30, 1922, a board of referees appointed by the Interstate Commerce Commission pursuant to § 3 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 454, found to be just. The application for the appointment of the board was made after the Director General had refused to pay the company any compensation.[1] The suit was begun after he had refused to accept the report as a basis for settlement. The case was heard upon a stipulation of the facts which the court adopted as its findings. The Government denied liability. It contended that there was not a legal taking, because the President did not take actual possession of the railroad, did not operate it, and did not otherwise exercise control. It contended, also, that, even if there was a technical taking of possession, the plaintiff was not entitled to any compensation because it suffered no pecuniary loss. Both contentions were sustained by the court; and judg-

[1]The board entered upon the hearing and made its report despite objection by the Director General that it was without jurisdiction, because the proceeding was commenced after Transportation Act, 1920, February 28, c. 91, 41 Stat. 456, 460, had provided by § 204 another and exclusive remedy for carriers which, like the plaintiff, had operated their own railroads throughout the period for which compensation was claimed.

ment was entered for the defendant on January 26, 1925, 60 Ct. Cls. 230. The appeal was duly taken under § 242 of the Judicial Code. We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims. *Grant* v. *United States,* 7 Wall. 331, 338.

Power to take possession and assume control of any railroad, on account of the war emergency, had been conferred upon the President by Act of August 29, 1916, c. 418, 39 Stat. 619, 645. See *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 142-147; *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 556-7; *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States,* 267 U. S. 346. The President issued, on December 26, 1917, a Proclamation which recited that "[I] do hereby . . . take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation . . . consisting of railroads, . . . "; and a Director General was appointed. 40 Stat. 1733. Some general notices or orders issued by the Director General were received by the Marion & Rye Railway Company shortly after the issue of the Proclamation; but no order dealing specifically with that railroad was given by him. He did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. The railroad did not serve any military camp; nor did it transport troops or munitions. The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting

to the Government, devoted the net operating income to the company's use.

The company urges that the claim sought to be enforced rests upon a statutory right to the just compensation specifically defined in § 1 of the Federal Control Act; that the compensation there prescribed is for the rental value at the rate of the average annual railway operating income for the three years ended June 30, 1917; that by the taking, although technical, the Government agreed to pay the compensation defined in the statute; that the function of the board of referees, acting under the statute, was to find that sum "as nearly as may be", and that by its report it had done so. It is true that in this case the claim is founded upon "a law of Congress"; not upon a "contract, express or implied." Judicial Code, § 145, Par. First. Recovery can not be sought upon the contract implied in fact which, in view of the constitutional obligation justly to compensate for property taken by eminent domain, ordinarily arises on a taking of private property by the Government pursuant to law, where no provision is made by statute for ascertaining the amount of compensation or for enforcing payment. Compare *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645; 124 U. S. 581; *Tempel* v. *United States*, 248 U. S. 121, 129. Here, both the method of determining the amount and the means of enforcing payment are prescribed by statute. Compare *William Cramp & Sons, etc. Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28. But the question remains what is the amount recoverable. Did the Federal Control Act merely confer authority upon the President to enter into an agreement to pay as much as the so-called "standard return," or did it also direct him, if such an agreement was not reached, to make payment on the basis of the "standard return"?

Congress has power to recognize moral obligations. *United States* v. *Realty Co.*, 163 U. S. 427, 441-443. Hence, it could have provided for payment on the basis of the standard return, even where there was no damage according to the rules of law ordinarily applicable to takings by eminent domain. Congress did not, however, direct the President to make such payment. It merely authorized him to agree with any carrier of whose railroad he took possession and control that it should "receive as just compensation an annual sum . . for each year and pro rata

54386

for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen." The provision did not establish a rule of compensation. The President was not permitted to agree to pay more, but he was left free to refuse to pay that sum. The carrier was left free to reject any offer that might be made. Where no agreement was reached, the carrier was relegated by § 3 to proceedings for ascertaining the amount of just compensation. The question thus becomes one of determining the "just compensation" for the use taken or damage done. If Congress had intended that the "standard return" should be taken as the measure of just compensation, in any event, there would have been no occasion for a hearing before a board of referees. The amount so payable could have been determined by calculation from the "average" annual railway operating income which, by § 1 of the Federal Control Act, p. 452, the Interstate Commerce Commission itself was required to ascertain and to certify to the President.

Thus, the fact that the right to recover compensation is a statutory one, did not relieve the railroad from the burden of proving the value of the use taken from the company or the damage suffered by it under rules ordinarily applicable to takings by eminent domain. Compare *Mitchell* v. *United States,* 267 U. S. 341, 345. Nor did the report of the board of referees supply the necessary evidence. It is true that § 3 of the Federal Control Act makes the report of the referees "prima facie evidence of the amount of just compensation and of the facts therein stated." But the legal effect of evidence is a question of law. The presumption otherwise attaching to a finding of the board was overcome by the facts stated in the report and in the findings of the Court of Claims. The board was required to "consider all the facts and circumstances"; and to "report as soon as practicable in each case to the President the just compensation" so ascertained. Its report discloses that it did not consider "the facts and circumstances." Its finding of just compensation rests wholly upon assumptions. It was assumed that compensation for the use of the company's property should be calculated upon the basis of an implied lease and agreement by the Government to pay a fair rental although, as the report states,

there was "no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental." It was assumed further that the assumed lease must be deemed to have been made for an indeterminate period, because the duration of federal control could not be foretold on December 28, 1917; that this rental value should be ascertained as of the date of the commencement of federal control, and should be measured, not upon the then immediate outlook for business for the first six months of 1918, but by the then probable earnings for a period of years; and finally that the amount should be fixed at one-half of the average annual operating income for the three years prior to January 1, 1918, and not at the smaller amount actually shown to have been earned during the six months' period and retained by the company. In other words, the board simply adopted as its measure the so-called "standard return" of the Federal Control Act. No evidence was introduced before it to show that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value, although the hearing before the board was commenced long after the period of alleged possession and control had expired.[2] The report was, therefore, without evidential value.

The opinion of the Court of Claims discloses, pp. 253-255, that the company claimed there that, if it was not entitled to recover under the Federal Control Act, it was entitled to recover under § 204 of the Transportation Act, 1920. This contention, overruled below, was not renewed here.

Affirmed.

---

[2]On or before July 4, 1918, the plaintiff received from John Barton Payne, General Counsel for the Director General, the following notice:

"June 24, 1918.

"DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same.

"Very truly yours,

"JOHN BARTON PAYNE.

"T. S. AMBLER, Gen. Mgr., Marion & Rye Valley Ry. Co."